53D GRADUATE COURSE

COURT-MARTIAL PERSONNEL
VOIR DIRE & CHALLENGES

OUTLINE OF INSTRUCTION

TABLE OF CONTENTS

MAJ Deidra J. Fleming

September 2004

THIS PAGE INTENTIONALLY LEFT BLANK

53D GRADUATE COURSE

COURT-MARTIAL PERSONNEL

VOIR DIRE & CHALLENGES

I. CONVENING AUTHORITY.

A. Review: A Convening Authority (CA) is an officer who has the power to decide whether to refer [forward or send] an accused's case to a court-martial for trial, appoint panel [jury] members, and take action approving, modifying or disapproving the findings and sentence. RCM 103(6); 401; 505; 601; 1107.

B. A CA who receives a charge sheet must make a prompt determination of the disposition of those charges. The CA's options include dismissal of the charges, forwarding them to a higher commander, or referral to a court-martial which that CA is empowered to convene. RCM 401. A CA may also appoint an investigation under Article 32, UCMJ, as a prerequisite to recommending a General Court-Martial. RCM 404(d).

C. An accused has a qualified right to have his case reviewed by an impartial CA. Cf. *United States v. Nix*, 40 M.J. 6 (C.M.A 1994). A CA may have her discretion limited if she has acted in some fashion that is inconsistent with the impartiality of a CA. A CA may, for example, become an "accuser." An accuser is a person who (1) signs and swears to charges, (2) directs that charges nominally be signed and sworn to by another, or (3) who has an interest other than an official interest in the prosecution of the accused. Article 1(9), UCMJ. *See also* RCM 601(c) Discussion.

1. A CA who is an accuser is disqualified from referring a case to a SPCM or a GCM. Articles 1(9), 22(b) and 23(b), UCMJ; RCM 601(c). The CA may dispose of the case administratively or dismiss the charges but, if she wishes the case to be tried by a general or a special court-martial, she must forward the case to the next higher commander, noting her disqualification. Articles 22(b), 23(b), UCMJ; RCM 401(c)(2)(A); 601(c).

2. A CA-accuser may be disqualified in either a "statutory" sense (e.g., having sworn the charges) or in a "personal" sense (by virtue of having an other than official interest in the case). *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). Whether the CA is statutorily or personally disqualified will determine the options available to the CA concerning a particular case.

a) Statutory disqualification. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). A convening authority who becomes an accuser by virtue of preferring charges is not, *per se*, disqualified from appointing a pretrial IO to conduct a thorough and impartial investigation of those charges.

b) Personal disqualification. Whether a reasonable person could impute to the convening authority a personal interest or feeling in the outcome of the case. *United States v. Jeter*, 35 M.J. 442 (C.M.A. 1992); *see also United States v. Gordon*, 2 C.M.R. 161 (1952); *United States v. Crossley*, 10 M.J. 376 (C.M.A. 1981); *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986) (listing examples of unofficial interests that disqualified CAs).

(1) Testifying Convening Authority. *United States v. Gudmundson*, 57 M.J. 493 (2003). Convening authority testified on dispositive suppression motion. Defense did not request that convening authority disqualify himself from taking post-trial action in the case but alleged on appeal that he should have disqualified himself. The CAAF held that the defense waived the issue by failing to raise it below, in light of the fact that the defense was fully aware of the ground for potential disqualification but chose not to raise it either at trial in its post-trial submissions. In dicta, CAAF reviews law in area. "A convening authority's testimony at trial is not per se disqualifying, but it may result in disqualification if it indicates that the convening authority has a 'personal connection with the case'" (citation omitted). "However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified" (citation omitted).

(2) *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994) (SPCMCA, who was angered by accused's sexual banter with CA's fiancée, may have been disqualified from forwarding case with recommendation; case set aside).

(3) *United States v. Byers*, 34 M.J. 923 (A.C.M.R. 1992) *set aside and remanded*, 37 M.J. 73 (C.M.A. 1993), *rev'd as to sentence*, 40 M.J. 321 (C.M.A. 1994), *sent. aff'd. on remand*, CMR 9101023 (A.C.M.R. 23 Jan. 1995) (unpub.). Accused charged under Art. 90, UCMJ for violating commanding general's (CG) order not to operate privately owned vehicle on post. Same CG referred the charge to a GCM. CG was not an accuser. Involvement was official and not personal. *See also United States v. Cox*, 37 M.J. 543 (N.M.C.M.R. 1993). Accused charged under Article 90,

UCMJ for violating CA's restriction order. Imposition of pretrial restriction is an "official act" which does not connect the CA so closely with the offense that a reasonable person would conclude he had anything other than an official interest in the matter.

(4) *United States v. Tittel*, 53 M.J. 313 (2000). Accused was convicted of shoplifting and several other offenses and processed for elimination when he was caught shoplifting again from the base PX. The SPCMCA signed an order barring the accused from entering any Navy PX, which the accused violated. The CAAF adopted the Navy court's reasoning that the order was a routine administrative directive and that the CA was not an "accuser" and that, in any event, the accused waived the issue. *See also United States v. Garcia*, 2003 CCA LEXIS 98 (N-M Ct. Crim. App. Apr 9, 2003) (unpub.). Applying the CAAF's opinions in *United States v. Tittel* and *United States v. Rockwood*, 52 M.J. 98 (1999), court held that appellant waived the accuser issue by failing to raise it at trial. In any event, the convening authority was not an "accuser" prohibited from convening a court-martial where convening authority issued the order the appellant is alleged to have violated. The order was not to operate POV on Camp Pendleton. Applying the standard that whether one is an accuser depends on whether, under the particular facts and circumstances . . . a reasonable person would impute to [the convening authority] a personal feeling or interest in the outcome of the litigation," the court found that the issuance of this routine "simple, written order" did not exceed official interest.

(5) *United States v. Haagenson*, 52 M.J. 34 (1999). Case remanded for fact-proceeding on issue of whether SPCMCA became an accuser. Accused was a warrant officer. SPCMCA originally referred the accused's case to a SPCM, but withdrew it and forwarded it with recommendation for GCM. Accused alleged on appeal the case was withdrawn and forwarded because base commander's XO, who was the SPCMCA's superior, told SPCMCA "I want [accused] out of the Marine Corps."

(6) *United States v. Dinges*, 49 M.J. 232 (1998). The accused was convicted of sodomy arising out of his activities as an assistant scoutmaster with a local troop of the Boy Scouts. The Scout Executive had terminated his status as an assistant, and contacted the SPCMCA (who was a district chairman of the Big Teepee District, Boy Scouts of America) about the matter. Prior to preferral of charges, the accused was assigned to the SPCMCA's command. The CAAF ordered a DuBay hearing to determine whether the convening authority had an other than official interest

that would disqualify him under UCMJ art. 1(9) and *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

(a) The CAAF stated that if the CA was personally disqualified, he could not order "charges investigated under Article 32, UCMJ," or recommend a general court-martial when forwarding those charges to the general court-martial convening authority.

(b) Based on facts gathered at the *DuBay* hearing, the CAAF held the SPCMCA did not become an accuser because he did not have such a close connection to the offense that a reasonable person would conclude he had a personal interest in the case. As such, he was not disqualified from taking action as a CA. *United States v. Dinges*, 55 M.J. 308 (2001).

(7) *United States v. Fisher*, 45 M.J. 159 (1996). Convening authority's mid-trial statements critical of defense counsel will not invalidate previous pretrial actions of selecting members and referring case to trial when CA's statements do not indicate that he was other than objective in processing court-martial. CA appeared as a government witness on a M.R.E. 313 motion to suppress a urinalysis. During the recess, the CA stated that "any lawyer that would try to get the results of the urinalysis suppressed was unethical." No taint attributed to selection process.

(8) *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993). Officer charged with adulterous affairs. CA was suspected of similar, albeit unrelated, offenses. In an "abundance of caution over the need to preserve the appearance of propriety" court set aside prior action of CA (approved sentence) and remanded for new SJA's advice and action by different convening authority.

(9) *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993). Findings and sentence did not have to be set aside on grounds the CA was himself suspected of misconduct. Conduct in question was unrelated to accused's misconduct. *United States v. Williams*, 35 M.J. 812 (A.F.C.M.R. 1992), *aff'd*, 41 M.J. 134 (C.M.A. 1994) (accused convicted of three rapes, robbery, sodomy, and aggravated assault was not entitled to disqualification of convening authority where CA was himself suspected of sexual misconduct; suspected misconduct of CA was of a non-violent nature; no

danger of "psychological baggage" being carried over to prejudice the accused).

3. The "Junior Accuser" Concept. Subordinate commander to an "accuser" may not convene a general or special court-martial. *See* RCM 504(c)(2) and Articles 22(b) and 23(b): "If. . . such an officer is an accuser, the court shall be convened by superior competent authority"; *United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984).

4. Failure to raise issue at trial results in waiver. *United States v. Gudmundson*, 57 M.J. 493 (2003). Convening authority testified on dispositive suppression motion. Defense did not request that convening authority disqualify himself from taking post-trial action in the case but alleged on appeal that he should have disqualified himself. The CAAF held that the defense waived the issue by failing to raise it below, in light of the fact that the defense was fully aware of the ground for potential disqualification but chose not to raise it either at trial in its post-trial submissions. In *dicta*, CAAF reviews law in area. "A convening authority's testimony at trial is not *per se* disqualifying, but it may result in disqualification if it indicates that the convening authority has a 'personal connection with the case'" (citation omitted). "However, 'if the [convening authority's] testimony is of an official or disinterested nature only,' the convening authority is not disqualified" (citation omitted).

5. On waiver*: See Tittel; United States v. Voorhees*, 50 M.J. 494 (1999): CA did not become an accuser by threatening to "burn" accused if he did not enter into PTA; even if he did, accused affirmatively waived issue at trial. *See also United States v. Shiner*, 40 M.J. 155 (C.M.A. 1994): Issue of CA whether CA was disqualified because accused allegedly violated CA's personal order was waived by failure to raise at trial.

6. RCM 1302(b). Accuser not disqualified from convening summary court-martial; or initiating administrative measures (Art. 15, L.O.R., Bar to Reenlistment, etc.).

D. Convening a Court-Martial: Selecting members.

1. CA convening a court-martial must personally detail panel members. RCM 503(a). "The convening authority shall detail qualified persons as members for courts-martial." The CA must determine who in the CA's *personal* opinion are "best qualified" under the criteria set out in Article 25, UCMJ:

***J*udicial Temperament**
***E*xperience**
***T*raining**

***A*ge**
***L*ength of Service**
***E*ducation**

2. Courts-martial panels must be personally selected by the convening authority. Similar systems have been challenged in other parts of the world and even Congress has shown some interest in reducing the convening authority's power to influence courts-martial through panel selection.

a) In the wake of *Findlay v. United Kingdom*, 1995 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R.), *confirmed by*, 30 Eur. Ct. H.R. (ser. B) at 263 (1997), both the British and Canadian armed forces have implemented systems that diminish the impact of local commanders on panel selection.

b) The National Defense Authorization Act for FY 1999, § 552, required the Secretary of Defense to develop a plan for random selection of members of courts-martial as a potential replacement for the current selection process and present the plan and views of the code committee to the Senate Committee on Armed Services and the House Committee on National Security. The Joint Service Committee unanimously concluded that, after considering alternatives, the current practice of CA selection best applies the criteria in Article 25(d) in a fair and efficient manner. The JSC report was forwarded to the SECDEF in August 1999.

c) A Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, sponsored by the National Institute of Military Justice and chaired by Senior Judge Walter T. Cox III of the United States Court of Appeals for the Armed Forces, was forwarded to the Secretary of Defense and Members of Congress on 5 September 2001. Observing "[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection, the "Cox Commission" recommends modifying the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that "best rest within the purview of a sitting military judge."

3. In the meantime, however, the CA is still required to personally select panel members. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978). This power cannot be delegated. *Cf. United States v. Benedict*, 55 M.J. 451 (2001). The Chief of Staff (CoS) submitted a final list of members to the CA, who then personally signed the convening order without asking any questions or making any changes. Setting aside the decision of the Coast Guard Court of Criminal Appeals, the CAAF held that the CA personally selected the nine prospective members set forth by the

CoS. *See* Judge Effron's dissent for a comprehensive discussion of the history of art. 25, UCMJ.

a) Authority to Convene?

(1) *United States v. Hundley*, 56 M.J. 858 (N-M. Ct. Crim. App. 2002). Battalion was designated as "separate" by the Secretary of the Navy and therefore under Art. 23(a)(7), UCMJ, its commanding officer had authority to convene a special courts-martial.

(2) *United States v. Hardy*, 60 M.J. ___, 2004 CCA LEXIS 170 (A.F. Ct. Crim. App. 2004). Between referral and the CA's action on the case, the Secretary of the Air Force issued an order which arguable revoked the CA's authority to convene courts-martial. AFCCA held, although the order was inartfully drafted, it did not revoke the CA's authority and, additionally, the Secretary of the Air Force issued a clarifying order proving his intent was not to revoke the CA's power. AFFCA held, in the alternative, even if the Secretary had intended to revoke the CA's authority, the commander still had statutory authority to convene courts-martial under Article 22 (a)(7) as a commander of an air force. "No administrative action is required to effect convening authority on a commander once he or she is placed in a command position at a numbered air force."

b) Detail of members from other commands. *United States v. Gaspard*, 35 M.J. 678 (A.C.M.R. 1992). Accused assigned to Ft. Polk. CA at Ft. Polk disqualified (talked to victim's parents) therefore case convened by Corps CG at Ft. Hood who referred case to a Ft. Polk court-martial convening order (CMCO) with Ft. Polk members. Question – did Corps CG personally select the (Ft. Polk) members? If not, "fatally flawed . . .." Case remanded for *DuBay* hearing.

c) Redesignation of commands and units raises issues concerning selection of members. *See United States v. Allgood*, 41 M.J. 492 (1995). Commander of "United States Army Training Center and Ft. Dix" became new general court martial convening authority (GCMCA) when command was redesignated "United States Army Garrison, Ft. Dix." ACMR held that new GCMCA committed jurisdictional error by merely adopting members previously selected by prior GCMCA. CAAF reverses ACMR and indicates failure to follow RCM 504(d) is not necessarily jurisdictional error because "military reality" was that CA was a "predecessor commander." CAAF also points out defense failure to object and lack of prejudice. *Dissent:* J. Cox; command was terminated and Art.

25 violated by lack of personal selection of court-members. *See also United States v. McKillop*, 38 M.J. 701 (A.C.M.R. 1993) (similar facts to *Allgood* (above)). *See also United States v. Brewick*, 47 M.J. 730 (N.M. Ct. Crim. App. 1997) (holding that *Allgood* does not require a successor-in-command to "expressly adopt" predecessor's panel selections). *Accord*, *United States v. Vargas*, 47 M.J. 552 (N.M. Ct. Crim. App. 1997). *But see Daulton* (below) where Army fails to adopt Navy's reasoning in *Brewick.*

d) Acting Commanders. Article 23, U.C.M.J.

(1) Service regulations govern in determining who is properly in command**.** Those regulations should be followed, but violation of regulation may not spell defeat for government. Court looks to who was actually in command at the time the action was taken. *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989). Army, AR 600-20; Navy/U.S.M.C., JAGMAN - JAGINST 5800.7C; Air Force, AFR 35-34.

(2) Functional analysis. *United States v. Gait*, 25 M.J. 16 (C.M.A. 1987). Concern is for realities of command, not intricacies of service regulations. *See also United States v. Jette*, 25 M.J. 16 (C.M.A. 1987).

e) Predecessor in Command Must Personally "Adopt" Members. *United States v. Dalton*, No. 20040187 (Army Ct. Crim. App. July 22, 2004 (unpub.)). The CA referred the case to a CMCO comprising members appointed by his predecessor. ACCA held no evidence existed to show that the CA expressly personally "adopted" the members from the CMCO in violation of Article 25 (d)(2) or that the CA knew who constituted the court-martial convened by the CMCO. Failure to expressly "adopt" the members is a jurisdictional defect requiring reversal of the findings and the sentence. *But see United States v. Dalton*, No. 20040187 (Army Ct. Crim. App. Aug. 20, 2004) (unpub.), which vacated the court's original opinion after obtaining an affidavit from the SJA swearing that the CA did personally adopt the court members selected by his predecessor. The court stated "[b]y the simple expedient of including and correctly referencing the predecessor's recommended CMCO in the referral document, the SJA can ensure that the codal responsibilities [of Article 25 on] the convening authority are clearly met."

4. **The nomination process**. Most services try to simplify the panel selection process, especially at larger installations, by having the CA solicit nominees from subordinate commanders, who must also apply Article 25 in deciding whom they will nominate for court-martial duty. The CA may then select from this shorter list, but she must be aware that 1) she must apply Article 25 and 2) she may select

anyone in her command. Such a nomination process has raised significant issues, such as the potential for staff involvement to taint the panel selection, and for errors in the nomination memoranda which can affect the panel selection. Military justice managers must be wary of these issues.

a) *United States v. Upshaw*, 49 M.J. 111 (1998). Believing the accused was an E6 (he was in fact an E5), the SJA sent out memorandum seeking nominees from the SPCMCAs, requesting nominees in the grade of E7 and above. The court found no error. An element of "court stacking" is improper motive; none was shown here. Defense conceded that the exclusion of technical sergeants (E6) was "just simply a mistake." The CAAF found the evidence did not raise the issue of court stacking. The error was simply administrative and not jurisdictional, and the court found no prejudice to the accused.

b) *United States v. Roland*, 50 M.J. 66 (1999). The SJA solicited court-martial panel nominees by asking that subordinate commanders recommend qualified personnel in grades "E5 to 06." The subsequent memorandum transmitting the list of nominees to the GCMCA indicated that he was not limited to the proposed enlisted members, but could select any enlisted members from his command, provided they met the Article 25 criteria. The court noted that once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred. Here, the court held that the defense had not carried its burden to show that there was unlawful command influence. The record establishes that there was no indication of impropriety in the selection of members.

c) *United States v. Kirkland*, 55 M.J. 22 (2000). The SJA solicited nominees from subordinate commanders via a memo signed by the SPCMCA. The memo sought nominees in various grades. The chart had a column for E-9, E-8, E-7 but no place to list a nominee in a lower grade. To nominate E-6 or below, nominating officer would have had to modify form. No one below E-7 was nominated or selected for the panel. The CAAF held that where there was an "unresolved appearance" of exclusion based on rank, "'reversal of the sentence is appropriate to uphold the essential fairness. . . of the military justice system.'"

d) Novel selection process. *United States v. Dowty*, 60 M.J. 163 (2004). Appellant contended that, by soliciting volunteers to serve as court members and then drafting a list of nominees for the CA's approval, the ASJA violated the letter and spirit of Article 25, UCMJ. Court upheld conviction in face of "potentially troubling" panel selection where CA personally selected members despite unorthodox nomination process. While it was error to nominate members based on an irrelevant variable,

such as volunteering, the error did not prejudice the appellant. Note: Appellant and his counsel were "given full opportunity to question potential members in open court to develop any possible biases or preconceptions, and, through appropriate causal and peremptory challenges, removed any potential member who they had reason to believe would not be capable, fair, and impartial." Also, by time of appellant's trial, only three "volunteers" remained on seven-member panel.

e) *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991). The division deputy adjutant general gathered a list of court member nominees who, in his opinion, supported a command policy of "hard discipline." Staff members can violate the provisions of UCMJ art. 37. Their errors will likely spill over to the convening authority.

f) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). Legal personnel who sought to ensure "hard core" female members selected for sex offense cases tainted convening authority's selection. The CMA condemned the involvement of trial counsel in the panel selection process. Case set aside.

E. Selecting a panel: Challenges to criteria used in panel selection.

1. The courts have allowed the convening authority to use other criteria in addition to those listed in Article 25. Race, gender, and duty position have been accepted, so long as the CA acts in good faith. Rank is not an acceptable criteria under Article 25.

2. **Race**. Inclusion by Race. *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964). As to black NCO, it is exclusion that is prohibited, not inclusion. *See also United States v Smith* (below).

a) Cross-sectional representation. *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989) (holding cross sectional representation of military community on court-martial panel is not required by the Constitution). *See also United States v. Carter*, 25 M.J. 471 (C.M.A. 1988) (holding no Sixth Amendment right that membership reflect a representative cross-section of the military population). Nevertheless, the commander may seek to have the panel's membership reflect the military community.

3. **Gender.** Permissible if for proper reason.

a) *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988). CA may take gender (or race) into account in selecting court members if seeking in good faith to select a court-martial panel that is representative of the

military population. But, evidence indicated a hidden policy of ensuring two females were on all sexual assault cases based on their "unique experience."

b) *United States v. Lewis*, 46 M.J. 338 (1997). In a case involving attempted voluntary manslaughter and assault on the accused's wife, the convening authority did not "stack" the panel with female members when, in response to a defense request for enlisted members, two of original five female officers were relieved and one female enlisted member was added, resulting in a panel of five male and four female members. (Original panel had ten members, five of whom were females.)

4. **Command or duty position**. Duty position is appropriate criterion if used in a good faith effort to comply with Art. 25 criteria.

a) *United States v. White*, 48 MJ 251 (1998). CA who issued a memorandum directing subordinate commands to include commanders, deputies and first sergeants in the court member applicant pool, and then proceeded to select more commanders than non-commanders for court-martial duty did not engage in court packing absent evidence of improper motive or systematic exclusion of a class or group of candidates.

(1) Eight of 10 nominees for the accused's trial were in command positions. Seven of the nine selected were commanders. There was no systematic exclusion because the CA's memo requested that "staff officers and NCOs" and "your best and brightest staff officers" should be nominated to serve as member.

(2) *See* Effron, J., and Sullivan, J., concurring in the result, but criticizing the majority's willingness to equate selection for command with selection for panel duty. S*ee also Yager*, 7 M.J. 171 (E1 and E2 presumptively unqualified).

b) **New danger area?** *United States v. Wiesen*, 56 M.J. 172 (2001) *recon. denied*, 57 M.J. 48 (2002). "Where a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." Finding prejudice resulting from the MJ's denial of a defense challenge for cause against the senior panel member, the CAAF reversed the ACCA, and set the findings and sentence aside.

5. Unit.

a) *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim.App. 2001). CA's deliberate exclusion of personnel assigned to the Army's Ordinance Center and School did not constitute unlawful "court packing" where the CA's motive was to find an unbiased and objective panel.

b) *United States v. Brocks*, 55 M.J. 614 (A.F. Ct. Crim. App. 2001). Exclusion of Medical Group officers did not constitute unlawful command influence where base legal office intentionally excluded all officers from the Medical Group from the nominee list, because all four alleged conspirators and many of the witnesses were assigned to that unit. Citing *United States v. Upshaw*, 49 M.J. 111, 113 (1998), "[a]n element of unlawful court stacking is improper motive. Thus, where the convening authority's motive is benign, systematic inclusion or exclusion may not be improper."

6. **Rank.** Rank is not listed as a criteria under Article 25, UCMJ. The convening authority may not use rank as a device for deliberate and systematic exclusion of qualified court members. *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975) (policy of excluding all lieutenants and WOs); *But see United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades below E-3 permissible); *see also United States v. Delp*, 11 M.J 836 (A.C.M.R. 1981) (below E-4).

a) *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986). Court selection procedure resulted in systematic exclusion of junior enlisted personnel and officers and was designed to exclude those more likely to adjudge light sentences. *But see United States v. McLaughlin*, 27 M.J. 685 (A.C.M.R. 1988) (CA did not violate Article 25 by excluding (excusing) the most junior officers and replacing them with enlisted members when an accused requested a panel including enlisted members).

b) *United States v. Smith*, 37 M.J. 773 (A.C.M.R. 1993). In handwritten note, convening authority directed major subordinate commanders to provide "E7" and "E8" members for membership on court-martial panel. ACMR found that selection was based solely on rank in violation of Article 25 U.C.M.J., and that the improper selection deprived the court of jurisdiction. Findings and sentence set aside.

c) *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998). An Air Force convening authority violated UCMJ article 25 when, after sending a memorandum to subordinate commands directing them to nominate "officers in all grades and NCOs in the grade of master sergeant or above for service as court-members," fails to select members below the rank of master sergeant (E-7). The convening authority, while testifying that he had no intent to violate Article 25, also testified that he had never

selected a member below the rank of E-7. The Air Force court noted that case law permits the systematic exclusion of ranks E-2 and below. A convening authority would violate Art. 25 by systematically excluding ranks E-4 to E-6. The findings and sentence were set aside. *This case provides an excellent review of the case law interpreting UCMJ art. 25 and court member selection.*

d) *United States v. Nixon*, 33 M.J. 433 (C.M.A. 1991). A panel consisting of only E8s and E9s creates an appearance of evil and is probably contrary to Congressional intent. The CG's testimony, however, established that he had complied with art. 25 and did not use rank as a selection criterion. Findings and sentence affirmed.

e) *United States v. Ruiz*, 46 M.J. 503 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 340 (1998). Convening authority did not improperly select members based on rank when, after rejecting certain senior nominees from consideration for valid reasons, he requested replacement nominees of similar ranks to keep the overall balance of nominee ranks relatively the same.

f) *United States v. Bertie*, 50 M.J. 489 (1999). Defense challenged selection of panel as improperly selected on the basis of rank (no member was below the grade of O4 or E8). The court noted that deliberate and systematic exclusion of lower grades and ranks is not permissible, nor may the convening authority purposefully stack a panel to achieve a desired result. However, the mere presence of senior ranking members does not create a presumption of court stacking or use of improper selection criteria. The court held there was no evidence presented to establish a court-stacking claim.

g) *See Upshaw, Roland, Kirkland*, above.

F. "Court stacking."

1. Generally, where the accused challenges the panel because the CA has allegedly excluded otherwise qualified people, analytically the CA's motive is irrelevant (e.g., the CA may have the intention of fully complying with Article 25, but, nevertheless, violates Article 25 when using rank as a "shortcut" in the selection process). However, where the convening authority appoints members to achieve a particular result (e.g., a conviction, or a harsh sentence), the CA has engaged in "court stacking" or "court packing." This is not a jurisdictional challenge *per se* but rather a species of command influence, in violation of Article 37. If the accused alleges the CA has engaged in court stacking, the court will look to the motivation and intent of the CA.

a) In *United States v. Redman*, 33 M.J. 679 (A.C.M.R. 1991), the court found that the government's dissatisfaction with the panel's unusual sentences actually meant dissatisfaction with findings of not guilty or lenient sentences. The court held the intentional manipulation of UCMJ art. 25 criteria to achieve a particular result in cases is a clear violation of UCMJ art. 25 and UCMJ art. 37.

b) *United States v. Smith*, 27 M.J. 242 (CMA 1988) (legal office policy of placing "hardcore" female members on panel in sex cases to achieve a particular outcome was ruled inappropriate).

c) *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (court packing occurred where functionary prepared lists of panel members based upon notions of hard discipline).

d) *United States v. Roland*, 50 M.J. 66 (1999). Test: Once the defense comes forward and shows an improper selection, the burden is upon the Government to demonstrate that no impropriety occurred.

G. Staff errors.

1. Triggering Mechanisms. *United States v. Mack*, 58 M.J. 413 (2003). SJA memorandum to convening authority concerning operation of convening order approved by the convening authority provided that, when accused requested panel of at least one-third enlisted members, alternate enlisted members would be automatically detailed without further action by the convening authority if, among other triggering mechanisms, "before trial, the number of enlisted members of the GCM, BCD SPCM, or SPCM court-martial panel falls below one-third plus two." Prior to trial, two officer and one enlisted members were excused, leaving five officer and five enlisted members (a total of nine members, of which one-third plus two, or five, were enlisted). At trial, two additional enlisted members sat, which appeared to be inconsistent with the above triggering mechanism. The defense did not object. ACCA remanded on its own for a *Dubay* hearing concerning the presence of the additional two enlisted members. CAAF held that, "When a convening authority refers a case for trial before a panel identified in a specific convening order, and the convening order identifies particular members to be added to the panel upon a triggering event, the process of excusing primary members and adding the substitute members involves an administrative, not a jurisdictional matter. Absent objection, any alleged defects in the administrative process are tested for plain error." Here there was no error. Excusal of one officer and the one enlisted member prior to the excusal of the other officer would have reduced the panel to ten members, five of whom were officers and five of whom were enlisted. This triggered the one-third plus two triggering event. Even if there was error in the triggering event, so long as the members were listed on

the convening order and the panel met the one-third requirement, any error in the operation of the triggering mechanism was administrative, not jurisdictional.

2. Interlopers. *United States v. Peden*, 52 M.J. 622 (Army Ct. Crim. App. 1999). Where Member A was selected by convening authority but Member B was inadvertently placed on convening order, Member B was an interloper whose presence constituted jurisdictional error. Court refused to apply doctrine of substantial compliance where there was no compliance.

3. No Convening Order. *United States v. Esparza*, ARMY 20020614 (Army Ct. Crim. App. Oct. 15, 2003) (unpub.). Failure of the convening authority to order original charges to be tried with Additional Charge (in new convening order), and failure to attach new referral directions to the original charge sheet (ordering all cases referred to old convening order be referred to new convening order) deprived court of jurisdiction over appellant and his offenses. Findings and sentence set aside.

II. COUNSEL.

A. Qualifications.

1. GCM. UCMJ art. 27(b): "Trial counsel . . . detailed for a general court-martial –

a) must be a judge advocate . . . and

b) must be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

2. SPCM & GCM. (RCM 502(d)). Defense counsel must be UCMJ art. 27(b) certified, trial counsel need not.

3. RCM 502(d)(2). Assistant trial counsel or assistant defense counsel need only be commissioned officer.

4. Summary Court-Martial. *Middendorf v. Henry*, 425 U.S. 25 (1976). The Sixth Amendment right to counsel does not extend to SCM.

5. Capital Cases.

a) Funding of Experts and Training. RCM 703(d). *United States v. Curtis*, 31 M.J. 434 (C.M.A. 1990). The court issued an interlocutory order requiring Navy JAG to provide $15,000.00 for "assistance related to

the unique constitutional issues" and "for various forms of other assistance related to aspects of this case." *But see United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1993). No abuse of discretion for military judge (MJ) to deny defense request for funding for independent investigator where CID agent was appointed to assist defense. *See* RCM 703(d).

B. Disqualification of Counsel.

1. Due to defect in appointment or lack of qualifications.

a) *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Defects in appointment or qualifications of trial counsel are matters of procedure to be tested for prejudice and have no jurisdictional ignificance.

b) Failure to be attorney. *United States v. Harness*, 44 M.J. 593 (N.M. Ct. Crim. App. 1996). Presence of defense counsel who was neither graduate of accredited law school nor properly admitted to practice did not constitute ineffective assistance of counsel under 6th Amend. Performance of defense counsel measured by combined efforts of defense team.

c) Failure to maintain "active" bar status. *United States v. Steele*, 53 M.J. 274 (2000). No error where accused's civilian DC was carried "inactive" by all state bars of which he was member (and such status prohibited him from practicing law). RCM 502(d)(3)(A) requires that a CDC be a member of a bar of a federal court or bar of the highest court of the state, or a lawyer authorized by a recognized licensing authority to practice law (and determined by MJ qualified to represent the accused). CAAF looked to federal case law holding that neither suspension nor disbarment creates a *per se* rule that continued representation is constitutionally ineffective (CAAF also noted a Navy instruction permits military counsel to remain "in good standing" even though they are "inactive"). Counsel are presumed competent once licensed.

2. Accuser. *United States v. Reist*, 50 M.J. 108 (1999). Assistant TC, a LTC and Director of a Law Center, had signed charge sheet and was present in court, identified as "accuser" on the record, and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), the court held defense waived the issue, and found no plain error.

3. Due to prior duty on opposite side. *United States v. Smith*, 26 M.J. 152 (C.M.A. 1988). Trial counsel who had been a member of the trial defense service and acted as a sounding board for part of the defense case was not disqualified;

United States v. Sparks, 29 M.J. 52 (C.M.A. 1989). Despite UCMJ Art. 27 violation, accused cannot complain when, "after full disclosure and inquiry by military judge," he gives informed consent to representation by defense counsel who previously acted for prosecution.

4. Due to Potential Disqualification as Witness. *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988). Although the accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel absent demonstrated good cause.

5. Due to incompetence. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989). MJ had discretion to remove accused's counsel of choice, and to appoint different counsel, where counsel of choice had effectively withdrawn from proceedings.

6. Due to Conflict of Interest.

a) Civilian Counsel Conflict of Interest. *United States v. Beckley*, 55 M.J. 15 (2001). At issue was the accused's right to retain civilian counsel whom the MJ determined to be disqualified because of the conflict of interest with the accused's estranged wife, who was represented by the lawyer's firm in a divorce action against the accused. After a detailed factual analysis, CAAF affirmed ACCA, holding that the civilian counsel had an actual conflict of interest and was required to withdraw.

b) Military Counsel Conflict of Interest. *United States v. Cain*, 59 M.J. 285 (2004). Soldier alleged that his lead trial defense counsel had a coerced, homosexual relationship with him that created an actual conflict of interest and deprived him of effective assistance of counsel. At *Dubay* hearing, the military judge found as fact that relationship was consensual and that appellant desired continued representation by his counsel, despite advice from two civilian counsel to fire him. ACCA held that appellant did not meet the two-pronged test to establish IAC due to an actual conflict of interest in a guilty plea: (1) that there was an actual conflict of interest; and (2) that the conflict adversely affected the voluntary nature of the guilty plea. The CAAF reversed, finding that the "volatile mixture of sex and crime in the context of the military's treatment of fraternization and sodomy as criminal offenses" resulted in a "uniquely proscribed relationship" that was "inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant" that resulted in ineffective assistance of counsel under the Sixth Amendment. Findings and sentence set aside.

c) Prior Representation.

(1) *United States v. Humpherys*, 57 M.J. 83 (2002). Assistant trial counsel (ATC) previously represented appellant in legal assistance matter (child support issue). At trial, defense moved to disqualify ATC alleging that, during interview of accused's wife, a potential defense sentencing witness, ATC asked questions the bases of which were her prior representation of appellant. MJ denied motion at trial because: the charges did not relate to the period of time of the prior representation; subject matter of prior representation had no substantial relationship to any matter at issue in the court-martial; and MJ accepted ATC's representation that she did not recall the specifics of the prior representation. When wife called as a witness, ATC conducted cross-examination. HELD: affirmed. Appellant failed to demonstrate either (1) that the subject of the prior representation was substantially related to the pending court-martial charges (adultery, sodomy, violation of lawful general regulation, and false official statements); or (2) that specific confidential information gained by ATC during the prior representation might have been used to the disadvantage of appellant in the present case. Appellant could have requested MJ review legal assistance file, which still existed, or appellant could have testified in closed hearing with sealed record as to the matters of prior representation. Appellant's mere conclusory assertions were not sufficient.

(2) *United States v. Golston*, 53 M.J. 61 (2000). Trial counsel's failure to promptly disclose his prior attorney-client relationship with appellant's wife, a defense witness, did not substantially prejudice appellant's rights. ATC cross-examined wife, allegedly based on information gained as result of TC's attorney-client relationship. Evidence at trial revealed that TC did not disclose any attorney-client confidences. In his concurring opinion, Judge Gierke wrote that while he agreed "with the majority's ultimate conclusion that appellant was not prejudiced under the specific facts of this case . . . [he] sincerely hope[d] that this case will cause prosecutors to be more sensitive to the potential conflicts of interest arising form multiple military duties."

(3) *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990). Accused met with legal assistance attorney (LAO). LAO then moved to prosecutor's office. LAO disclosed to TC that he had represented accused on unrelated matter. Court follows three part (Rushatz) test to determine if attorney disqualified: (1) was there former representation (2) was there a substantial relationship between subject matters, and (3) was there a subsequent proceeding. Held: LAO attorney did not act as "prosecutor" in the case (although he did appear with trial counsel at Article 32). Due to status as

accuser. Asst TC, Director of a Law Center, had signed charge sheet and was present in court, announced as "accuser," and argued at sentencing that accused's conduct was "cowardly criminal conduct of a sexual pervert." While ATC was accuser under Article 1(9), UCMJ, and clearly disqualified to act as ATC (RCM 504(d)(4)(A)), defense waived the issue, and the court found no plain error. *United States v. Reist*, 50 MJ 108 (1999).

(4) *United States v. Smith*, 44 M.J. 459 (1996). Defense counsel previously represented another airman in companion case for Art 15 proceedings. Former client did not testify at trial, but testimony presented via stipulation of expected testimony. Accused consented to representation. Court holds that client could not make informed decision regarding representation, even after being advised by counsel, because counsel did not understand ramifications of conflict issue; former client was still subject to court-martial even though nonjudicial punishment had been imposed; and court was concerned that accused denied fair trial because of stipulation rather than cross-examination of important witness.

d) *United States v. McClain*, 50 M.J. 483 (1999). Accused complained his lawyers were conspiring with the trial counsel. The accused also had several disagreements with his defense counsel, and told the military judge his counsel had lied to him. In response, one of his counsel told the military judge that the accused has told "lies here today in court." Nevertheless, the military judge denied counsel's request for release, and accused ultimately requested both counsel represent him. The court held the issue of a conflict of interest (because of a disagreement in strategy) was waived by the accused. The defense was entitled to respond to the accused's assertions.

e) *United States v. Thompson*, 51 M.J. 431 (1999). A pretrial complaint against defense counsel, made by appellant's wife, did not create a conflict of interest disqualifying him from further participation in this case. The court also held that accused was not denied effective assistance of counsel when military defense counsel cautioned him about retaining civilian counsel and discouraged him from getting help from a psychologist.

f) *United States v. Johnston*, 51 M.J. 227 (1999). Where detailed defense counsel left active duty prior to preparation of a new SJA recommendation, failure of the convening authority to detail substitute counsel for appellant deprived him of his opportunity for sentence relief with the convening authority and was prejudicial to appellant's substantial rights.

g) *United States v. Murphy*, 50 M.J. 4 (1998). The Government called Private (PVT) French as a witness against appellant. French had been one of appellant's pretrial cell mates in the Mannheim Correctional Facility. French allegedly overheard the accused make incriminating comments to another inmate. French related this conversation to his lawyer, CPT S, who later negotiated a PTA for French. CPT S then moved to withdraw from French's case. Later, at accused's trial, French testified. The military judge was the same judge who had presided over French's trial. Defense counsel, of whom CPT S was one, did not impeach the testimony of French, although he had recently been convicted of several crimes involving dishonesty and deceit. Neither counsel nor the military judge discussed the potential conflict of interest on the record. The military judge had a *sua sponte* duty to resolve conflict questions on the record, and defense had a duty to discuss potential or actual conflicts of interest with accused. Such multiple representation creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. The court held that, assuming there was a conflict of interest, it had no impact on the merits portion of the trial, since French's testimony was mostly cumulative. However, the court was less convinced of the lack of impact on the sentence. Case returned to the Army for further proceedings.

h) *United States v. Allred*, 50 M.J. 795 (N.M. Ct. Crim. App. 1999). A preexisting attorney-client relationship may be severed by government only for good cause. "Good cause" did not exist where defense counsel had entered into relationship with accused concerning pending charges, charges were dismissed during the time accused was medically evacuated for evaluation of heart problems, and DC was told by SDC that, due to pending PCS, DC would not be detailed to case if charges re-preferred. Court found that DC's commander's finding of unavailability was abuse of discretion. Prejudice presumed and findings and sentence set aside.

III. ACCUSED

A. Accused's forum selection.

1. Trial before Military Judge Alone.

a) Request. R.C.M. 903(b)(2). Trial by judge alone may be requested orally or in writing by the accused. *See also United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). Accused may withdraw request for good cause.

b) A right? *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977). There is no *right* to a judge alone trial. *But see United States v. Butler*, 14 M.J. 72

(C.M.A. 1982). The MJ must state reason for denial of a judge alone request.

c) *United States v. Webster*, 24 M.J. 96 (C.M.A. 1987). Denial of a timely motion for trial by judge alone cannot be based on judge's desire to discipline counsel nor to provide court members with experience.

d) *United States v. Edwards*, 27 M.J. 504 (C.M.A. 1988). Once MJ ruled he was not disqualified from hearing case, he abused his discretion by denying accused his right to trial by judge alone, as requested.

e) *United States v. Mayfield*, 45 M.J. 176 (1996). The absence of a written or oral request for trial by MJ alone did not establish a substantial matter leading to jurisdictional error based on the dialogue at trial, the absence of a defense objection, and appellant's post-trial Article 39(a) confirmations of his desire to be tried by MJ alone. A post-trial session is permissible to cure jurisdictional errors created by the failure to obtain an accused's request for trial by MJ alone. Conviction affirmed.

f) *United States v. Turner*, 47 M.J. 348 (1997). A written request for trial by MJ alone, which counsel made and submitted before trial, and then confirmed orally at an Article 39a session with the accused present substantially complies with Article 16, UCMJ. While the MJ erred in failing to obtain an oral statement of selection of the forum from the accused, the error did not materially prejudice the accused. (Specified issue). *See also United States v. Mayfield*, above.

g) *United States v. Seward*, 49 M.J. 369 (1998). An accused's forum request from a previous court-martial that was terminated by mistrial cannot be used to support a forum request at a subsequent court-martial. However, the accused suffered no prejudice under UCMJ article 59 because his request for trial by MJ-alone was apparent from the pretrial agreement (forum selection was a term), and there was a written request for the same even though offered after completion of the sentencing proceedings. The rule of *United States v. Mayfield*, 45 M.J. 176 (1996) (practical application of statute when record indicates that accused not prejudiced by technical violation of a statute in court personnel issues) obviated any claim of jurisdictional error.

h) *United States v. Jungbluth*, 48 M.J. 953 (N.M. Ct. Crim. App. 1998). Accused pled guilty to wrongful use of marijuana on divers occasions before a properly assemble court consisting of a panel of officer members. A MJ was forced to declare a recess after the TC became ill. At the next session of court the parties presented the MJ with a PTA. Under the PTA, the MJ *dismissed the officer panel*, conducted a MJ-alone providence

inquiry, findings portion, and sentencing hearing. A MJ can lawfully approve a request for trial by MJ-alone *after assembly* if justified by the circumstances. RCM 903 does not expressly prohibit approval of after assembly forum requests, and in this case, the MJ approved the request under the terms of a pretrial agreement in which the accused agreed to plead guilty to one charge and specification, withdraw his request for trial by members and to request trial by MJ-alone. The agreement was mutually beneficial to both sides and the accused suffered no prejudice.

2. Request for trial before members. R.C.M. 903(b)(1).

a) Doctrine of substantial compliance. *United States v. Morgan*, 57 M.J. 119 (2002). Although military judge erred by failing to obtain accused's request for enlisted members on the record, there was substantial compliance with Article 25, UCMJ. Any error was procedural rather than jurisdictional, and did not materially prejudice the appellant's substantial rights. Panel selection was indicated by fax sent from detailed defense counsel to the military judge indicating request for enlisted members; *Dubay* hearing revealed that fax reflected appellant's choice, and that appellant had changed his choice, court would have been so notified. *See also United States v. Townes*, 52 M.J. 275 (2000); *United States v. Turner*, 47 M.J. 348 (1997); *United States v. Mayfield*, 45 M.J. 176 (1996). *But see United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). At UCMJ Art. 39(a), accused deferred decision regarding choice of forum. Court convened with officer and enlisted members detailed and present. Nothing in the record, oral or written. Jurisdictional defect per RCM 903(b). Findings and sentence set aside.

b) *United States v. Daniels*, 50 M.J. 864 (Army Ct. Crim. App. 1999). Where accused was tried by enlisted members and there was no evidence on the record reflecting personal forum selection, jurisdiction was properly found by a military judge in an ACCA-ordered *Dubay* hearing, which established that accused had discussed her forum choices with her counsel, and that, prior to the assembly of the court, she had decided to elect trial by an enlisted panel, and that her counsel had then presented a document to TC stating that the accused requested an enlisted panel. Failure to elicit forum selection on the record was a technical defect in the application of Article 25, a defect that, as was clear from the *Dubay* hearing, did not prejudice the substantial rights of the accused.

c) *United States v. Lanier*, 50 M.J. 772 (Army Ct. Crim. App. 1999), *aff'd*, 53 M.J. 220 (2000) (summary disposition). Counsel's consulting with the accused and announcing on the record, in response to judge's question, "We will have a court with enlisted" substantially complied with the terms of Article 25(c)(1).

d) *United States v. Townes*, 50 M.J. 762 (N.M. Ct. Crim. App. 1999), *set aside on other grounds*, 52 M.J. 275 (2000). DC announced at an Article 39(a) session that "we make a forum election for officer and enlisted members." Military judge did not personally question accused. Evidentiary hearing ordered on appeal. Accused stated he could not recall whether, at the time of trial, he desired enlisted members. The Navy-Marine Corps Court held that the court was without jurisdiction, holding that the requirements of Article 25 are stringent: Accused must personally select, orally on the record or in writing, trial by enlisted members. Even though he never voiced any complaint about the composition of the court, *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985), requires that the court find a lack of jurisdiction; the court held that Congress intended the accused would personally select members. Article 16, concerning trial by military judge alone, differs because it does not require that the accused "personally" select forum. By retaining this language in Article 25, Congress intended that the accused could not be tried by enlisted members unless he personally so requested. CAAF disagreed, applied "substantial compliance," and reversed the Navy Court.

e) *United States v. Gray*, 51 M.J. 1 (1999). No error where accused, who had signed his request for enlisted members with words "Negative Reading," was directed by military judge to elect a forum and he subsequently signed his name above the words "Negative Reading;" any confusion the accused experienced concerned his name and not his forum choices.

3. Refusal of Request for Enlisted Members. *United States v. Summerset*, 37 M.J. 695 (A.C.M.R. 1993). MJ abused his discretion when he denied as untimely accused's request for enlisted members made four days prior to trial. MJ made no findings of fact regarding unnecessary expense, unacceptable delay, or significant inconvenience. *See* RCM 903(a)(1) and (e).

B. Trial in Absentia. R.C.M. 804(b).

1. The accused shall be considered to have waived the right to be present if after initially present he/she (1) voluntarily absents self after arraignment, or (2) is removed for disruption.

2. *United States v. Bass*, 40 M.J. 220 (C.M.A. 1994). Accused did not return for trial after being arraigned 23 days earlier (delay for sanity board).

3. *United States v. Sharp*, 38 M.J. 33 (C.M.A. 1993). Notice to accused of exact trial date or that trial may continue in his absence, while desirable, is not a prerequisite to trial in absentia. Burden is on the defense to go forward and refute

the inference of a voluntary absence. MJ must balance public interest with right of accused to be present.

4. *United States v. Price*, 43 M.J. 823 (Army Ct. Crim. App. 1996), *rev'd*, 48 M.J. 181 (1998). Trial *in absentia* is not authorized when a military judge (MJ) fails to conduct a proper arraignment. Reversing the ACCA, the CAAF stated that when a MJ asked accused whether charges should be read, but failed to call upon the accused to plead, this constituted a defective arraignment. Waiver by voluntary absence will not operate to authorize trial *in absentia* if arraignment is defective, particularly considering that MJ failed to also inform the accused that trial would proceed in accused's absence.

5. *United States v. Thrower*, 36 M.J. 613 (A.F.C.M.R. 1993). While giving unsworn statement during sentencing, accused succumbed to effects of sleeping pills he took earlier and remainder of statement given by defense counsel. Held to be a voluntary absence.

C. Accused's Rights to Counsel.

1. *Pro se* representation.

a) *Iowa v. Tovar*, 124 S. Ct. 1379 (2004). Prior to proceeding *pro se* at a guilty plea, the Sixth Amendment is satisfied if the trial court "informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Warnings that: "(1) advise the defendant that waving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked; and (2) admonish[ing] the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty" (internal quotations omitted) are not required by the Sixth Amendment.

b) *United States v. Mix*, 35 M.J. 283 (C.M.A. 1992). R.C.M. 506(d) requires a finding that the accused understands: (1) the disadvantages of self representation and; (2) if the waiver of counsel was voluntary and knowing. Opinion includes an appendix containing suggested questions.

c) *Godinez v. Moran*, 113 S. Ct. 2680 (1993). Supreme Court says the standard of competence to proceed *pro se* is no different than that required for an accused to stand trial. Military appellate courts appear to imply a higher level of competence for accused to waive counsel. *See also United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989) (A "higher standard of competence must exist for an accused to waive counsel and conduct his

own defense than would be required to merely assist in his own defense."). *United States v. Streater*, 32 M.J. 337 (C.M.A. 1991) (the CMA notes the accused was competent to "represent himself and to actually defend himself.")

2. Individual military counsel. R.C.M. 506(b). UCMJ art. 38(b); AR 27-10, para 5-7. *United States v. Spriggs*, 52 M.J. 235 (2000), *recon. denied*, 53 M.J. 242 (2000). An accused is not entitled to the services of a reserve judge advocate as his military defense counsel unless the accused can show that he entered into a bona fide attorney-client relationship with the advocate regarding the charges or that the advocate actively participated in the preparation of the pretrial strategy in the case. A military defense counsel's release from active duty constitutes good cause for severance of the attorney-client relationship. In addition, even if one existed, it was severed by the defense counsel's release from active duty.

3. Civilian Counsel. *United States v. Wiest*, 59 M.J.276 (2004). Military judge abused his discretion in denying defense request for delay to obtain civilian counsel. "It should . . . be an unusual case, balancing all the factors involved, when a judge denies an initial and timely request for a continuance in order to obtain civilian counsel, particularly after the judge has criticized appointed military counsel." Applying the factors from *United States v. Miller*, 47 M.J. 352 (1997) (surprise, timeliness of the request, other continuance requests, good faith of moving party, and prior notice), the Court held that the judge erred. Findings and sentence set aside.

4. Foreign counsel. R.C.M. 502(d)(3)(b). *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980). MJ determines if individual foreign civilian counsel is qualified.

IV. COURT MEMBERS.

A. The Sixth Amendment right to a jury of one's peers does not apply in the military. Court members are personally selected by the CA. This has led to criticism of the military justice system over the years, primarily because the CA, the commander who decides whether to "refer," or send, the accused's case to a court-martial, is also the person who selects the panel that will hear the case. To ensure that CAs appointed members who are conscientious and fair, Congress established broad criteria that the commanders must use in selecting panel members. Those criteria are set out below. Despite the creation of these criteria, litigation often arises over the CA's selection, for the CA violates the UCMJ if she:

1. selects members in a manner that deliberately and systematically excludes a group of otherwise qualified members, or

2. "stacks" the panel by picking only members who will guarantee a conviction or a harsh sentence.

B. Qualifications.

1. Virtually any member of the armed forces is eligible to serve on a court-martial panel. However, the CA may only select those members that, in the CA's personal opinion, are "best qualified" in terms of criteria set out in Article 25, UCMJ: ***Age, Experience, Education, Training, Length of Service and Judicial Temperament***.

2. While, generally, any servicemember is eligible to serve, not every member is "qualified" to serve. Moreover, the UCMJ and the Department of the Army (DA) have established some exceptions.

a) A member's duty position, and the bias implicit in that position, may preclude service.

(1) Law Enforcement Personnel. *United States v. Swagger*, 16 M.J. 759 (A.C.M.R. 1983). "At the risk of being redundant - we say again - individuals assigned to military police duties should not be appointed as members of courts-martial. Those who are the principal law enforcement officers at an installation must not be."

(2) *United States v. Dale*, 42 M.J. 384 (1995). Accused charged with sexual offenses against a child. Member of panel (Air Force 0-3) was Deputy Chief of Security Police and had sat in on criminal activity briefings with base commander. Focus is on the perception and appearance of fairness. Member was intimately involved day-to-day law enforcement on the base; "the embodiment of law enforcement and crime prevention." MJ's denial of challenge for cause reversed and case set aside.

(3) *United States v. Berry*, 34 M.J. 83 (C.M.A. 1992). Member was command duty investigator for NAS Alameda security and knew and worked with key government witness. MJ says "I don't think he said anything that even remotely hints that he could not render a fair judgment in this case." Abuse of discretion in the face of mere naked disclaimers by member. Reversed. *But see United States v. McDavid*, 37 M.J. 861 (A.F.C.M.R. 1993) (no "per se" rule of exclusion for security policemen).

(4) *United States v. Fulton*, 44 M.J. 100 (1996). MJ did not abuse discretion by denying challenge for cause against member who

was Chief of Security Police with Bachelor of Arts in criminal justice, where member only had contact with accused's commander on serious matters requiring high level decisions, and member had no prior knowledge of appellant's misconduct. *Cf. Dale*, above.

b) The Secretary of the Army has further excluded certain personnel from consideration. AR 27-10, paras 7-1 thru 7-7, excludes Chaplains, Medical, Dental, Veterinary Officers, Nurses, Medical Specialist Corps, and IGs from service in Army courts-martial. While there is no DA ban on JAs serving, lawyers are generally never selected for court-martial duty. *See United States v. Sears*, 6 C.M.A. 661, 20 C.M.R. 377 (C.M.A. 1956).

3. Junior in rank. *United States v. McGee*, 15 M.J. 1004 (N.M.C.M.R. 1983). When it can be avoided, court members should *not* be junior in rank to the accused. Failure to object results in waiver. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 2100 (1994). Defense discovered court member was junior to accused during deliberations on findings and remained silent until the morning after findings were read in open court. Issue waived. *See also* RCM 503(a) Discussion.

4. Finally, the military courts have recognized that, because of their limited time in service, personnel below the grades of E-1 and E-2 (that is, PVTs and PV2s in the Army) may be presumptively disqualified under application of the Article 25 criteria.). *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979) (exclusion of persons in grades **below E-3 permissible** where there was a demonstrable relationship between exclusion and selection criteria embodied in Art. 25(d)(2)).

5. UCMJ Art. 25(c)(1). Enlisted members should not be from the same "unit" as the accused.

a) *United States v. Milam*, 33 M.J. 1020 (A.C.M.R. 1991). Two enlisted members of the panel were assigned to the same company size unit as accused. A.C.M.R. holds (with defense challenge for cause) that the two members were statutorily ineligible to sit under the language of UCMJ art. 25(c). Also relevant is the language of RCM 912(f)(1)(A). Findings and sentence set aside.

b) "Same unit" is not a jurisdictional defect. *United States v. Wilson*, 21 M.J. 193 (C.M.A. 1986). Failure to object waives the issue. *United States v. Zengel*, 32 M.J. 642 (C.G.C.M.R. 1991), *cert. denied*, 33 M.J. 185 (C.M.A. 1991).

C. Quorum.

1. Five members for GCM, three members for SPCM. *Ballew v. Georgia*, 435 U.S. 223 (1978). "Jury" of less than six is unconstitutional (civilian). *But see United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978), *pet. denied*, 6 M.J. 305 (C.M.A. 1979) (holding 6th Amendment right to trial by "jury" does not apply to courts-martial); *United States v. Hutchinson*, 17 M.J. 156 (C.M.A. 1984).

2. Failure to assemble court of at least one-third enlisted members is jurisdictional error necessitating setting aside panel-adjudged sentence. *United States v. Craven*, 2004 CCA LEXIS 19 (A.F. Ct. Crim. App. Jan 21, 2004) (unpub.) (following challenges for cause and peremptory strikes, enlisted members constituted only 28.6 percent (five officer and two enlisted) of court membership).

3. Twelve members for capital case. 10 U.S.C. sec. 825a (UCMJ, art. 25a) requires minimum of twelve members in capital cases, absent special circumstances, effective for all offenses committed after 31 December 2002. NOTE: SPC Gray was convicted and sentenced to death by a panel of six.

D. Excusal.

1. Prior to assembly RCM 505(c)(1) allows delegation to staff judge advocate or convening authority's deputy authority to excuse up to 1/3 of the members. *See* AR 27-10, para. 5-20c. "Assembly" means after the preliminary organization is complete, the members are sworn, and the trial judge announces that "the court is assembled." *See United States v. Morris*, 23 U.S.C.M.A. 319, 49 C.M.R. 653 (1975).

a) *United States v. Cook*, 48 M.J. 434 (1998). The excusal of more that one-third of the members of a panel by the convening authority's delegate rises to the level of reversible and jurisdictional error only if the defense objects to the excusals and substitutions of members at trial, and the record somehow indicates that the accused was deprived of a right to make causal or peremptory challenges. Here, the SJA excused five of nine members who were detailed to sit as members. The CAAF held the accused suffered no prejudice because he failed to object to the excusals at trial, but skirted the issue of whether to apply the 1/3 rule to the venire (the 9 detailed) or to the total pool of selectees (five of nine detailed for the accused's case vs. five of thirty-one total members on primary and alternate member lists).

2. Excusal after assembly can occur only as the result of a challenge or by the MJ for good cause shown. *United States v. Latimer*, 30 M.J. 554 (A.C.M.R.

1990). Court member's upcoming appointment for physical examination was not "good cause." A sleeping member is good cause for excusal. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993). MJ could have rehabilitated member by reading portions of transcript. Not an abuse of discretion, however, to excuse. What if excusal dropped court below quorum? Mistrial? *See* RCM 806(d)(1).

E. Requests to Call Witnesses/Evidence. *United States v. Lents*, 32 M.J. 636 (A.C.M.R. 1991). Court member questions were essentially a request to call witnesses. Court members may request witnesses be called or recalled. The MJ must weigh difficulty, delay, and materiality; consider whether a privilege exists; and whether the parties object. *See also United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982) (even after deliberations have begun members may request additional evidence.).

F. Replacement Members. Avoid sloppy paper trails. "The administration of this court-martial...can best be described as slipshod." "Such a lack of attention to correct court-martial procedure cannot be condoned." The amended CMCO mistakenly removed member who actually sat on panel. Order also included member who was not present without explanation for the absence. The amending order also incorrectly referred to the original order by the wrong number. Held: errors were administrative and not jurisdictional. Issue was waived by defense failure to object. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). *See also United States v. Sargent*, 47 M.J. 367 (1997) and *United States v. Larson*, 33 M.J. 715 (A.C.M.R. 1991). *See also United States v. Mack, supra*.

G. Voir Dire. See below.

V. MILITARY JUDGE.

A. Qualifications.

1. Reserve Judges; Recent Change to the MCM.

a) Change to R.C.M. 502; Executive Order removed holdover provision concerning qualifications for military judges.

b) MCM had mandated that military judges be commissioned officers on active duty in the armed forces. The new RCM 502(c) deleted that requirement, enabling reserve military judges to try cases while on active duty, inactive duty training, or inactive duty training and travel.

c) Issue: Does this mean reservists can try GCM and BCD-SPCMs? Generally, no. Only military judges assigned directly to TJAG and TJAG's delegate (the Trial Judiciary) may preside at GCMs. AR 27-10, paras. 8-1(e) –(f).

2. UCMJ art. 26. Military judge shall be a commissioned officer who is a member of the bar of a Federal court **or** the highest court of a State **and** who is certified to be qualified for duty as a military judge by TJAG.

a) State Bar status. Military judge's "inactive status" with her state Bar nevertheless equated to her being a "member of the Bar" of Pennsylvania as contemplated by Article 26(b). *United States v. Cloud*, ARMY 9800299 (Army Ct. Crim. App., December 14, 2000) (unpub.); *United States v. Brown*, ARMY 9801503 (December 11, 2000) (unpub.) (ACCA also considered fact that judge, although "inactive" in state bar, was a member in good standing of "this [the ACCA] federal bar.").

3. Detail. AR 27-10, para. 5-3. Detail is a ministerial function to be exercised by the Chief Trial Judge, U.S. Army Judiciary, or his or her delegate. The order detailing the MJ must be in writing, included in the record of trial *or* announced orally on the record.

a) Detailing in a joint environment. Military judges are normally detailed according to the regulations of the "Secretary concerned." In a joint environment, there is no "Secretary concerned." *See* Captains William H. Walsh and Thomas A. Dukes, Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195 (1999). Detailing should be agreed upon by convening authority, SJA, and defense. *Id.*

4. Tenure/Fixed Term and Appointment. Settled issue regarding appointment of civilians to Coast Guard Court of Criminal Appeals. *Edmond v. United States*, 117 S.Ct. 1573 (1997), *affirming United States v. Ryder*, 44 M.J. 9 (1996) (holding that civilian judges on Coast Guard Court of Criminal Appeals are inferior officers and do not require additional presidential appointment; therefore, the Congressional delegation of appointment authority to Secretary of Transportation to appoint judges is consistent with Appointments Clause. *See also United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1993), *aff'd*, 510 U.S. 163 (1994). *United States v. Grindstaff*, 45 M.J. 634 (N.M. Ct. Crim. App. 1997) (Judges of courts of criminal appeals, military judges, and convening authorities are not principal officers under Appointments Clause and do not require a second appointment).

B. "Presence" required. But whose presence is required? *United States v. Reynolds*, 44 M.J. 726 (Army Ct. Crim. App. 1996), *aff'd*, 49 M.J. 260 (1998). The physical absence of the military judge at a pretrial proceeding does not deprive an accused of the structural due process protections created by UCMJ articles 26 and 39, and R.C.M. 803, 804, and 805. The MJ held arraignment proceedings by speakerphone. The MJ was at Fort Stewart while the accused, DC and TC were in a courtroom at Fort Jackson. The MJ advised the accused of all rights and the accused consented to the speakerphone procedure. The military judge was not "present" but the accused's due process rights

were not violated: The speakerphone procedure lasted for just twelve minutes of a seven hour trial and the MJ was physically present for the remainder of the trial.

1. Issue: Is it correct to say that the *military judge* was not present? Couldn't it be argued that the military judge was present but the *accused* was absent? If that is the case, the error that occurred was that the military judge allowed the accused to waive his (the accused's) presence at arraignment. It may be that the Army court was simply trying to avoid the difficulty that the RCM would pose if it found the accused was voluntarily absent from the arraignment. *Cf.* RCM 804(b)(1), (2) (accused may waive his presence *after* arraignment; he waives his presence at arraignment only if he is disruptive).

C. Disqualification.

1. In general. RCM 902(a). "[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Test: *Wilson v. Ouelette*, 34 M.J. 798 (N.M.C.M.R. 1991). Moving party must show factual basis for judge's disqualification. Test under RCM 902(a) is not actual partiality but the existence of a reasonable question about impartiality. Decision on recusal is reviewable for an abuse of discretion.

a) Financial interest? *United States v. Reed*, 55 M.J. 719 (Army Ct. Crim. App. 2001). The accused pled guilty to conspiracy to commit larceny and to willfully and wrongfully damaging nonmilitary property in a scheme to defraud USAA automobile insurance company. During sentencing, a USAA claims handler talked about fraudulent claims and their effect on the company's policyholder members. The MJ (himself a policyholder member) immediately disclosed his affiliation with USAA and stated this would not affect his sentencing decision. The MJ allowed the defense an opportunity to voir dire, and the DC exercised it. The MJ also offered the defense the opportunity to challenge him for cause, but the defendant declined. The court, after *sua sponte* disclosing all judges of the ACCA are also policy holders of USAA, held there was nothing improper or erroneous in the judge's failure to disclose his policy holder status until a potential ground for his disqualification unfolded. Further, it found the MJ's financial interests so remote and insubstantial as to be nonexistent.

b) Potential disqualification based on background. *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998). A MJ who was the victim of spousal abuse 13 years ago before presiding at a trial of an accused charged with battery of his pregnant wife (and intentionally inflicting grievous bodily harm on his wife and involuntary manslaughter by unlawfully causing termination of his wife's pregnancy) did not abuse her discretion in failing to recuse herself. The Air Force court directs MJs

to apply a totality of the circumstances type test to resolve recusal matters involving MJs who are victims of the type of offense with which an accused is charged. The court emphasizes that our "national experience" supports a [preference] for "judges with real-life experiences."

c) Military judge and accused members of same chain of command. *United States v. Norfleet*, 53 M.J. 262 (2000): Presence of military judge's superiors in SPCMCA chain of command did not require military judge's recusal under RCM 902. Accused was an AF paralegal, assigned to AF Legal Services Agency. Commander, AFLSA, served as director of AF judiciary and endorser on military judge's OER. Commander of AFLSA forwarded case (without recommendation) to Commander, 11th Wing (the SPMCA), for disposition. CAAF held that this did not constitute a *per se* basis for disqualification. In light of MJ's superiors taking themselves out of the decision making process, the full disclosure of the MJ, and opportunity provided to DC to voir dire the MJ, the accused received a fair trial by an impartial MJ.

2. Judicial exposure.

a) *Sao Paulo v. American Tobacco Co., Inc.*, 535 U.S. 229 (2002). In a *per curiam* decision, the Supreme Court held that a judge is not disqualified under 28 U.S.C. § 455(a) (upon which R.C.M. 902(a) is based) by the appearance of judge's name on a motion to file an *amicus* brief in a similar suit against some of the same companies. Section 455(a) (and R.C.M. 902(a)) requires a judge to recuse himself in any case in which his impartiality may be questioned. The lower court's opinion (reversed by the Supreme Court) was inconsistent with *Liljeberg v. Health Services Acquisition Corps.*, 486 U.S. 847 (1988), which held that §455(a) requires recusal only where "a reasonable person, knowing all the circumstances, would have expected that the judge would have actual knowledge of his interest or bias in the case." The lower court did not consider "all the circumstances," specifically that the judge's name was apparently added to the brief in error, and that he played no part in its preparation. As such, the Supreme Court reversed and remanded for further proceedings consistent with its opinion.

b) *Liteky v. United States*, 114 S.Ct. 1147 (1994). Supreme Court (interpreting 28 U.S.C. § 455(b)(1)) indicates that prior judicial rulings against a moving party almost never constitute a basis for a bias or partiality recusal motion. Recusal not required except when prior rulings or admonishments evidence deep-seated favoritism or antagonism as would make a fair judgment impossible. *Cited in United States v. Loving*, 41 M.J. 213 (1994).

c) *United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985). If the MJ is accuser, witness for prosecution, or has acted as investigating officer or counsel, disqualification of MJ is automatic. But MJ need not recuse himself solely on basis of prior judicial exposure to the accused. *See also United States v. Proctor*, 34 M.J. 549 (A.F.C.M.R. 1992).

d) *United States v. Rivers*, 49 M.J. 434 (1998). The military judge did not abuse his discretion in denying defense motion that he recuse himself based on the fact that he had ruled on a command influence issue similar to the accused's in a companion case, and that he had learned that accused had offered to plead guilty. The military judge ruled in the accused's favor on the UCI issue, and no incriminating evidence or admissions from the accused relating to the offer to plead guilty were disclosed during trial on the merits. There was no reasonable doubt about the fairness of accused's trial.

e) *United States v. Howard*, 50 M.J. 469 (1999). No prejudicial error occurred where military judge presided at prior case involving accused (who was tried twice, first for assault, then for AWOL), military judge noted prior adjudication on the record, and accused maintained he wished to proceed with the present judge (during the defense case on sentencing in the AWOL case, the defense introduced the accused's version of the events underlying the prior conviction; military judge interrupted defense counsel and stated that, although he had awarded appellant "an unusually light sentence for a fractured jaw," he found him guilty during that prior trial because he had kicked the victim in the head while he was on the ground; CAAF held that there was no error).

f) *United States v. Bray*, 49 M.J. 300 (1998). The MJ is not required, *per se*, to recuse himself from further proceedings in a trial when he has conducted a providence inquiry, reviewed a stipulation of fact, and entered findings of guilty to initial pleas. Here, accused withdrew plea based on possible defense that came out during sentencing. Later, he obtained a new pretrial agreement, and returned to plead guilty. Military judge could preside over second case unless he had formed an "intractable opinion as to the accused's guilt," and a reasonable person who knew the facts of the case would question the appearance of impurity and have doubts as to the MJ's impartiality.

g) *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992). MJ is not *per se* disqualified after conducting a providence inquiry and then rejecting accused's plea of guilty to a lesser included offense. Counsel and judges should determine whether the judge should ask the accused if accused wants to continue to be tried by judge alone when the judge has rejected the plea.

h) *United States v. Elzy*, 25 M.J. 416 (C.M.A. 1988). MJ not required to recuse himself based on "irreconcilable differences." *See also United States v. Blanchard*, 24 M.J. 803 (N.M.C.M.R. 1987) Civilian DC indicated in 802 conference that he had concerns about accused's veracity.

i) Knowledge of witnesses.

(1) *United States v. Davis*, 27 M.J. 543 (C.M.A. 1988). MJ must use special caution in cases where he has heard a witness' testimony against a coactor at a prior trial. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). Exposure to motions and pleas at prior trial of coactors did not require recusal of MJ in trial before members.

(2) *United States v. Wright*, 52 M.J. 136 (1999). Military judge announced at trial that he had a prior "close" association with NCIS agent stemming from a duty station at which the military judge, as a prosecutor, worked closely with the agent on several important criminal cases. MJ said he felt the NCIS agent was an honest and trustworthy person and a very competent NCIS agent, but that the witness would not have a "leg up" over the credibility of other witnesses, particularly the accused. The judge said he gave all members of the Marine Corps a certain "credence." CAAF noted that military judges have broad experiences and a wide array of backgrounds that are likely to develop ties with other attorneys, law firms, and agencies. Here, military judge's full disclosure, sensitivity to public perceptions, and sound analysis objectively supported his decision not to recuse himself; these factors contribute to a perception of fairness.

j) *United States v. Phillipson*, 30 M.J. 1019 (A.F.C.M.R. 1990). Inadvertent exposure to sentence limitation does not require judge to recuse himself. See also *United States v. Quick*, 2003 CCA LEXIS 104 (N-M Ct. Crim. App. Apr. 18, 2003) (unpub.). Military judge did not err by failing to recuse himself after he became aware of sentence limitation in pretrial agreement. The PTA limit was revealed during defense sentencing case; as such, any error was invited error. Moreover, disclosure did not prejudice appellant. MJ sentenced appellant to 65 years; PTA limited confinement to 30 years.

k) Consultations. *United States v. Baker*, 34 M.J. 559 (A.F.C.M.R. 1992). Judge's consultations with another judge concerning issue in a case is not improper.

j) Further actions void. *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (holding when a judge is disqualified, all further actions are void). *See also United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991) (holding when MJ becomes a witness for the prosecution, the MJ is disqualified and all further actions, as in *Sherrod*, are void). *United States v. Wiggers*, 25 M.J. 587 (A.C.M.R. 1987) (holding when MJ recognized that his prior determination of witness'- lack of credibility disqualified him from acting as fact finder, judge should have recused himself rather than direct a trial with members). *But see United States v. Burris*, 25 M.J. 846 (A.F.C.M.R. 1988) (holding presiding over earlier trial involving same urinalysis inspection did not disqualify trial judge). *See also United States v. Cornett*, 47 M.J. 128 (1997).

k) Accused's waiver of disqualification under R.C.M. 902(e). *United States v. Keyes*, 33 M.J. 567 (N.M.C.M.R. 1991). MJ previously sat in a different case involving the accused. Defense had no challenge under R.C.M. 902(b) and waived any challenge to the judge that might exist under R.C.M. 902(a). MJ properly recognized a *sua sponte* obligation to disqualify himself if warranted even with a defense waiver under 902(e). The judge, however, found no basis for disqualification. Upheld by NMCMR.

3. Extra-record statements and conduct.

a) *United States v. Quintanilla*, 56 M.J. 37 (2001). The military judge became involved in verbal out-of-court confrontations with a civilian witness that included profanity and physical contact. The military judge also engaged in an *ex parte* discussion with the trial counsel on how to question this civilian witness about the scuffle. The CAAF held the military judge's failure to fully disclose the facts on the record deprived the parties of the ability to effectively evaluate the issue of judicial bias. As such, the court remanded the case for a *DuBay* hearing.

b) *United States v. Butcher*, 56 M.J. 87 (2001). The military judge, who was presiding over a contested trial, went to a party at the trial counsel's house and played tennis with the trial counsel. The CAAF reviewed whether the military judge abused his discretion by denying a defense request that the judge recuse himself. The CAAF advised that under the circumstances the military judge should have recused himself. However, the Court held there was no need to reverse the case, because there was no need to send a message to the field, the social interaction took place after evidence and instructions on the merits, and public confidence was not in danger (the social contact was not extensive or intimate and came late in trial).

c) *United States v. Cornett*, 47 M.J. 128 (1997). MJ did not abuse discretion when he denied a defense challenge for cause against the MJ based on an *ex parte* conversation between the MJ and trial counsel wherein the MJ stated "Well, why would you need that evidence in aggravation, because I've never seen so many drug offenses? Why don't you consider holding that evidence in rebuttal and presenting it, if necessary, in rebuttal?" The MJ invited voir dire concerning any predisposition toward sentence; accused selected MJ-alone pursuant to voluntary pretrial agreement term; counsel and accused were given a recess to confer about the challenge after the accused made his forum selection; and the MJ made full disclosure on the record and disclaimed any impact on him. R.C.M. 902(a) requirements regarding recusal and disqualification were fully met.

d) *United States v. Miller*, 48 M.J. 790 (N.M. Ct. Crim. App. 1998). Assuming *arguendo* that MJ stated, upon hearing that the accused suffered a drug overdose and was medically evacuated to a hospital, that the accused was a "cocaine addict and a manipulator of the system" and that "perhaps the accused would die," such comments did not establish a personal bias or prejudice on part of the MJ. Rather, the remarks indicated a high level of impatience and frustration with an unplanned delay in a scheduled court-martial proceeding. The test applied by the Navy court was whether the remarks reasonably suggests a "deep-seated and unequivocal antagonism" towards the accused as to make fair judgment impossible. *See Liteky v. United States*, 510 U.S. 540 (1994).

4. Conduct of trial and judicial advocacy.

a) Praise. *United States v. Carper*, 45 C.M.R. 809 (N.M.C.R. 1972). Improper for military judge to praise prosecution witness for his testimony.

b) Examination. Assess whether the judge's questions assist either side of the case. The number of questions is not a significant factor, but the tenor of those questions will be. *United States v. Johnson*, 36 M.J. 866 (A.C.M.R. 1993). TEST: Whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put in doubt by the military judge's questions. *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987).

(1) *United States v. Acosta*, 49 M.J. 14 (1998). Accused was convicted of wrongful distribution and use of methamphetamine. The defense's case was based on entrapment. The defense cross examination resulted in the government witness stating that he put undue pressure on the accused to purchase drugs. When the trial

counsel failed to elicit the entrapment-negating information, the MJ asked the witness 89 questions about the accused's prior uncharged misconduct relating to a drug transaction that predated the drug offenses that were the basis of the court-martial. CAAF: The law permits an MJ wide latitude in asking questions of witnesses, the MJ has a right, equal to counsels', to obtain evidence, and the information was clearly rebuttal evidence that was admissible once the defense raised the entrapment defense.

(2) *United States v. Paaluhi*, 50 M.J. 782 (N.M. Ct. Crim. App. 1999), *rev'd on other gds*., 54 M.J. 181 (2000). The military judge did not abandon his impartial role despite accused's claims that the judge detached role and became a partisan advocate when his questions laid the foundation for evidence to be admitted against appellant and when he instructed appellant to assist the Government to procure the presence of the prosecutrix.

(3) *United States v. Shackleford*, 2 M.J. 17 (C.M.A. 1976). MJ used information gained during busted providence inquiry to ask questions later before court members.

(4) *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984). MJ asked 370 questions to accused, no error under these facts.

(5) *United States v. Morgan*, 22 M.J. 959 (C.G.C.M.R. 1986). MJ overstepped bounds of impartiality in cross-examining accused to obtain admission of knife, which trial counsel had been unsuccessful in obtaining admission. *But see United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990) (holding MJ's assistance in laying foundation for the admission of evidence was not error. Actions did not make the judge a partisan advocate.).

(6) *United States v. Richardson*, 2004 CCA LEXIS 157 (N-M. Ct. Crim. App. July 29, 2004) (unpub.). MJ did not abandon his impartial role by asking a series of questions of the accused after his sworn presentencing statement. MJ's indication that he was asking the questions to ensure that trial observers were fully informed was appropriate based on the MJ's concern in ensuring public confidence in the outcome of the trial.

c) Impartial and Objective Stance. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990). MJ erred in *sua sponte* initiating discussion of appropriateness of defense counsel's sentencing argument and allowing trial counsel to introduce additional rebuttal.

(1) *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). MJ improperly limited DC's voir dire, cross-examination, extensively questioned defense witnesses, limited number of defense witnesses, assisted TC in laying evidentiary foundations, and limited DC's sentencing argument.

(2) *United States v. Felton*, 31 M.J. 526 (A.C.M.R. 1990). MJ should not have advised trial counsel on the order of challenges during voir dire.

(3) *United States v. Figura*, 44 M.J. 308 (1996). MJ did not become de facto witness for prosecution when during sentencing he gave members summary of accused statements during providence inquiry. Defense and Government agreed to have MJ give summary, rather than introduce evidence through transcript or witness testimony.

(4) *United States v. Barron*, 51 M.J. 1 (1999). The military judge did not abuse his discretion in denying motion for mistrial where government expert witness passed notes to trial counsel during cross examination of the defense expert. Even though the military judge acknowledged that the expert had virtually become a member of the prosecution team, a mistrial was not per se required. Moreover, the judge gave an extensive instruction noting that the expert had a "mark against" her, and granted the defense's alternative request to fully cross-examine this prosecution expert and reveal her pro-prosecutorial conduct to the members. Any bias, beyond that normally attributed to the party who called her, was therefore fully disclosed to the members.

(5) *United States v. Harris*, 51 M.J. 191 (1999). The military judge in a child sexual abuse case did not abuse his discretion when he did not declare a mistrial after the government improperly elicited inadmissible credibility testimony and uncharged misconduct evidence from the prosecution's expert witness. The expert was questioned concerning the credibility of the alleged victim and she disclosed alleged threats by the accused. The defense objected, the members were instructed to disregard the question and answer, and, ultimately, trial counsel was removed from the direct examination. Defense counsel stated the accused wished to go forward with the trial and not move for mistrial. The court found no prejudicial error in the manner in which the military judge dealt with the improper credibility evidence.

(6) *United States v. Watt*, 50 MJ 102 (1999). The military judge abandoned his impartial role when he ruled the accused could not respond to a question from the members (he had been asked "What reason did you have to believe she would have sex with you?" His answer would have been that the complainant had a "reputation for being easy."). The military judge then repeatedly asked the accused the question, and allowed TC to badger him with similar questions. Accused repeatedly stated that he could not answer the question asked. Counsel then implied in closing that accused knew he had no reason to believe complainant would not have sex with him, as opposed to a simply inadmissible one. Accused "was left to defend himself without assistance" from defense or military judge. (Sullivan, J., dissented, finding waiver and no prejudice).

(7) Racial Bias or Prejudice. *United States v. Ettinger*, 36 M.J. 1171 (N.M.C.M.R. 1993). Although remarks by MJ may demonstrate prejudice sufficient to constitute bias, accused must be a member of that class in order for comments to be disqualifying.

(8) *United States v. Cooper*, 51 M.J. 247 (1999). Military judge's making allegedly inappropriate comments to defense counsel did not plainly cause him to lose his impartiality or the appearance of his impartiality. The military judge's comments included repeating before the members the fact that defense had "thank[ed] [him] for helping perfect the government's case" through questions of a government witness. The military judge also commented disparagingly on the poor quality of the defense counsel's evidence (a videotape made by the accused's wife). The defense did not object to any of the comments. CAAF found no plain error; the military judge's questions were not inappropriate, he explained the neutral intent of his questions and instructed the members that they should not construe his questions as being pro-prosecution. His expression of irritation with defense, although inappropriate before the members, did not divest him of the appearance of impartiality because his comments were couched within unequivocal instructions protecting the accused from prejudice. Finally, his comments upon the quality of the defense evidence were not impermissible, because just as RCM 920(e)(7) Discussion permits the military judge to comment on the evidence during instructions, so should the military judge be allowed to comment on evidence during trial. While the military judge's comments "may have been improper," the trial's legality, fairness and impartiality were not put into doubt by the judge's questions.

(9) *United States v. Weisbeck*, 50 M.J. 461 (1999). In 1994, accused was tried by GCM for sexually assaulting two teenaged

brothers, and he was acquitted. The key to the defense case in the 1994 court-martial was a psychiatric expert. In 1995, at another installation, accused was charged with offenses relating to two other adolescent boys. The military judge ruled the two boys from the 1994 could testify under Mil. R. Evid. 404(b). The civilian attorney from the 1994 court joined the defense team for the 1995 case in October, then requested a delay to permit attendance of the psychiatric expert used in the 1994 court. The military judge denied this request, and the CAAF held that this was error and that the defense request was not unreasonable. Findings and sentence set aside.

(10) *United States v. Thompson*, 54 M.J. 26 (2000). Military judge did not depart from his impartial role despite issuing numerous adverse rulings against defense, taking over questioning from counsel, shutting off presentations, expressions of impatience and exasperation with counsel, and the making of condescending or berating comments about counsels' performance. Defense counsel repeatedly alluded to being "ineffective" or being forced into providing ineffective representation. CDC requested that the military judge recuse himself under RCM 902(a), 902(b)(1), 905. Military defense counsel became tearful and complained she would think twice before raising an issue. Military judge countered "you need to investigate…a new line of work." While court noted much of the blame breakdown between parties "stems from the military judge's inappropriate and intemperate remarks to counsel on the record," CAAF found military judge's actions were not so unreasonable that he abandoned his impartial role. Nevertheless, case returned to the Court of Criminal Appeals to order affidavits from both civilian and military defense counsel or to order a *DuBay* hearing on issue of ineffective assistance of counsel.

(11) *United States v. Burton*, 52 M.J. 223 (2000). None of the military judge's questions reflect an inflexible predisposition to impose a bad-conduct discharge. The military judge imposed only 30 days' confinement, well below the jurisdictional limit of the court-martial and the maximum punishment for the offense.

5. "Bridging the gap." The US Army Trial Judiciary Standard Operating Procedure encourages military judges to conduct a "Post-trial Critique" one-on-one with counsel "after trial" to improve trial skills. This practice is fraught with peril and judges, should they elect to offer to conduct bridging the gap sessions, should limit such discussions to trial advocacy tips as opposed to substantive matters.

a) *United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990) (suggesting "Bridging the Gap" may need reevaluation in light of issues arising concerning discussions by trial judges of legal issues that may come before them in future cases; *ex parte* discussions with counsel about the conduct of the trial; and, discussions with counsel before the trial is final about rulings in the case).

b) *United States v. McNutt*, 59 M.J. 629 (Army Ct. Crim. App. 2003), *pet. granted* 60 M.J. ___ (2004). MJ revealed during Bridge the Gap session that adjudged sentence was framed to take into account amount of good time credit soldier would receive, and to ensure that soldier would actually serve sixty days confinement. Sentence was seventy days; with ten days good time, soldier would serve sixty days. Court held that this type of extraneous information was not improperly before the MJ, as it was "within the general and common knowledge a military judge brings to deliberations;" as such, there was no basis for impeaching appellant's sentence. The court went on to state that although Bridge the Gap sessions are "expected, and usually beneficial," "the core of the deliberative process remains privileged, and military judges should refrain from disclosing information . . . concerning their deliberations, impressions, emotional feelings, or the mental processes used to resolve an issue before them . . . Military judges should therefore allow their findings and sentences to speak for themselves during "Bridge the Gap" sessions, and re-focus these sessions upon the conduct of counsel rather than the deliberations of the military judge."

c) If the military judge elects to conduct such sessions, consider the following:

(1) MJ should never conduct *ex parte*.

(2) MJ should avoid giving substantive advice (e.g., "trial counsel, here is how you lay the foundation for that exhibit that I helped you admit;" or "here's how you properly select a panel.").

(3) MJ should always bear in mind the trial may not be truly "over." *Cf. United States v. Holt*, 46 M.J. 853 (N.M. Ct. Crim. App. 1997) (suggesting that, where trial judges provide post-trial "practice pointers" to counsel prior to the cases being finalized, recusal would be mandated if the case were sent back for some sort of rehearing).

D. Expanded Powers and Remedial Action.

1. *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). "Consistent with our conclusion . . . that Congress intended for a military judge to have the power to conduct post-trial proceedings until authentication of the record has taken place, we are convinced that … before authenticating the record of trial … he may take remedial action on behalf of the accused without awaiting an order therefor by an appellate court."

2. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). Article 39(a) empowers judge to convene post-trial session to consider newly discovered evidence and to take remedial action. This empowers the MJ, in proper cases, to set aside findings of guilt and sentence. If the CA disagrees, the only remedy is to direct trial counsel to move for reconsideration or to initiate government appeal.

3. *United States v. Mahoney*, 36 M.J. 679 (A.F.C.M.R. 1993). Then Chief Judge for Air Force sixth judiciary circuit did not usurp power by convening a post-trial session to inquire into possible improper commander intervention as a result of commander ordering confinement of accused contrary to order of trial judge after court-martial. Chief Judge did not usurp power by reducing accused's sentence by 18 months as remedy for commander's intervention.

4. *United States v. Lepage*, 59 M.J. 659 (N-M. Ct. Crim. App. 2003). MJ committed plain error by admitting record of Article 15 into evidence. MJ determined that admitting the exhibit was erroneous in a post-trial 39(a) session, and that the erroneously admitted exhibit was considered by court in arriving at a sentence. However, MJ failed to take any corrective action during that hearing, but instead recommended that the convening authority disapprove BCD; convening authority declined to follow MJ recommendation.. HELD: "This case should not even be before us for review. . . the military judge had the authority under R.C.M. 1102(b)2) to take corrective action." That section takes precedence over R.C.M. 1009(a) (reconsideration of a sentence).

5. *United States v. Chisholm*, 58 M.J. 733 (Army Ct. Crim. App. 2003). Military judges, as empowered by Congress and the President, have both a duty and a responsibility to take active roles in "directing" the timely and accurate completion of court-martial proceedings. After adjournment, but prior to authentication of the record of trial, the military judge must ensure that the government is proceeding with due diligence to complete the record of trial as expeditiously as possible, given the totality of the circumstances of that accused's case. If the military judge determines that the record preparation is proceeding too slowly, he may take remedial action without awaiting an order from this court. The exact nature of the remedial action is within the sound judgment and broad discretion of the military judge, but could include, among other things: (1) directing a date certain for completion of the record with confinement credit or other progressive sentence relief for each day the record completion is late; (2) ordering the accused's release from confinement until the record of trial is

completed and authenticated; or, (3) if all else fails, and the accused has been prejudiced by the delay, setting aside the findings and the sentence with or without prejudice as to a rehearing. Staff judge advocates and convening authorities who disregard such remedial orders do so at their peril.

E. Replacement of Military Judges UP R.C.M. 505(e)(2). *United States v. Kosek*, 46 M.J. 349 (1997). The Air Force did not violate a CAAF remand order by substituting a new military judge at appellant's court-martial after the CAAF ordered that the record be returned to the "military judge" for reconsideration.

VI. OTHER COURT-MARTIAL PERSONNEL.

A. Staff Judge Advocates.

1. *United States v. Jones*, 52 M.J. 60 (1999). Accused was charged with conspiracy to submit a false claim, larceny, and other offenses. His co-accused were offered punishment under Article 15 if they agreed to testify against the accused. When the co-conspirators invoked their rights and seemed hesitant to cooperate, the SJA called the RDC and said that the three soldiers would be court-martialed if they did not testify in accordance with their agreement. The CAAF said the informal agreements were tantamount to a grant of de facto immunity, that the President had not formulated rules governing such "informal immunity," but that there was no command influence and no material prejudice to the accused.

2. *United States v. Taylor*, 60 M.J. 190 (2004). Eight days after the accused's court-martial, trial counsel published an article in the base newspaper warning commanders to properly prepare adverse personnel records. The article resulted from the trial counsel's inability to admit the accused's adverse personal records, because of numerous administrative errors, which the trial counsel characterized as a disservice to justice. Based on the article, the defense sought the disqualification of the SJA. The SJA, while stating the article could be imputed to him in an addendum recommendation, took action on the case. The CAAF held where a SJA imputes a disqualification to himself his participation in the post-trial review process is error, that the accused made a "colorable showing of prejudice", and returned the case for a new post-trial review.

B. Court Reporter. RCM 502(e). *United States v. Yarbrough*, 22 M.J. 138 (C.M.A. 1986). Accuser improperly acted as court reporter but reversal not required where accuser only operated microphone system and did not transcribe proceedings and prepare the record of trial.

C. Interpreter. RCM 502(e). Must be qualified and sworn.

D. Bailiff. RCM 502(e). Cannot be a witness. *United States v. Martinez*, 40 M.J. 82 (C.M.A) 1994). MJ committed prejudicial error when, during sentencing deliberations, he conducted an *ex-parte* communication with bailiff.

E. Drivers.

1. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993). MJ's assigned driver told witnesses waiting to testify that the MJ told her that "he had already decided the case." MJ addressed issue at post-trial UCMJ art 39(a) hearing as motion for mistrial and found that: (1) he had never made such a statement; and (2) that driver was trying to impress witnesses with her apparent "inside information." A.C.M.R returns for *Dubay* hearing and indicates that MJ should have recused himself at the post-trial UCMJ art. 39(a) session. Otherwise, no misconduct by MJ and no prejudice to accused.

2. *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995). Three senior enlisted court members solicited daily information from driver about his opinions regarding witness veracity, medical testimony, and what transpired during Art. 39(a) sessions. Defense motion for mistrial made during deliberations denied. CA grants immunity to members in post-trial 39(a). ACCA said SJA, CA, and MJ "were remiss" in failing to apply presumption of prejudice absent clear and positive showing by government.

VII. VOIR DIRE & CHALLENGES

A. Purpose.

1. To Gather Sufficient Information Regarding the Qualifications of Court members. R.C.M. 912 (a)(1); R.C.M. 912(d)-(g).

2. Educate the Panel and Defuse Weaknesses.

3. Establish a "Theme."

4. Build Rapport.

B. Judge Controls.

1. Before Impaneled. *United States v. Dewrell*, 55 M.J. 131 (2001). The accused, an Air Force master sergeant with over 19 years service, was convicted by an officer panel for committing an indecent act upon a female less than 16 years of age. The CA approved a sentence of dishonorable discharge, 7 years confinement, and reduction to E-1. On appeal the accused alleged the MJ abused

his discretion by refusing to allow any defense voir dire questions concerning the members' prior involvement in child abuse cases or their notions regarding preteen age girls fabrications about sexual misconduct. The CAAF, using an abuse of discretion standard, upheld the trial judges' practice of having counsel submit written questions seven days prior to trial, not allowing either side to conduct group voir dire, and rejecting DC's request for case specific questions relating to child abuse or the possibility that preteen girls fabricate allegations of sexual misconduct.

2. After Impaneled. *United States v. Lambert*, 55 M.J. 293 (2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the CDC asked the MJ to allow voir dire of the members because one member took a book titled Guilty as Sin into the deliberation room. The MJ conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct individual or group voir dire. Noting that neither the UCMJ nor the Manual gives the defense the right to individually question the members, and analyzing the issue under an abuse of discretion standard, the CAAF held the MJ did not err by declining to allow DC to voir dire the members.

3. Cautionary note: *United States v. Simpson*, 58 M.J. 369 (2003). In high profile case involving allegations of unlawful command influence and unfair pretrial publicity, court notes repeatedly that the military judge permitted counsel to conduct extensive individual voir dire prior to trial. *See also United States v. Dowty*, 60 M.J. 163 (2004) (novel panel selection process affirmed in part due to MJ allowing defense counsel to conduct extensive voir dire of members concerning selection)

4. *United States v. McDonald*, 57 M.J. 747 (N-M Ct. Crim. App. 2002). MJ required written questions beforehand, and asked several government questions (some of which the MJ revised) over defense objection. Questions involved whether members ever discussed with their children what they should do if someone propositions them in an inappropriate way, and how the members thought a child would do if an adult solicited them for sex. Citing the *Belflower* standard, e.g., that "the appellate courts will not find an abuse of discretion when counsel is given an opportunity to explore possible bias or partiality," the Court found no abuse of discretion. "Whether it is the Government or the accused, we believe that the aforementioned rules governing the content of voir dire apply equally. In other words, the TC had as much right to obtain information for the intelligent exercise of challenges as the TDC."

5. Abuse of discretion?

a) *United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993). Abuse of discretion not to allow defense counsel to voir dire prospective members

about their previous experiences with or expertise in drug urinalysis program, and their beliefs about the reliability of the program.

b) *United States v. Williams*, 44 M.J. 482 (1996). The military judge (MJ) did not unreasonably and arbitrarily restrict voir dire by denying a defense request for individual voir dire of member (SGM) who expressed difficulty with the proposition that no adverse inference could be drawn if accused failed to testify, and another member (MAJ) who disclosed that he had a few beers with one of the CID agents who would be a witness. Defense counsel did not conduct additional voir dire. The MJ granted the defense challenge for cause against the SGM. The Defense peremptorily challenged the MAJ based on a theory that the denial of individual voir dire deprived the defense of an opportunity to sufficiently explore the basis for a challenge for cause. Court holds "[s]ince defense counsel decided to forego questioning, he cannot now complain that his ability to ask questions was unduly restricted."

c) *United States v. Jefferson*, 44 M.J. 312 (1996). The MJ did not abuse his discretion by refusing to permit "double-teaming" by defense counsel during voir dire; and limiting individual voir dire and questions regarding burden of proof, inelastic attitude toward members, and credibility of witnesses when defense counsel admitted that initial questions in these areas were confusing. However, MJ did abuse discretion in not allowing defense to reopen voir dire to explore issue of potential bias of two members who stated they had friends or close relatives who were victims of crimes.

d) *United States v. Belflower*, 50 M.J. 306 (1999). Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire. CAAF did not apply *Jefferson's* standard (abuse of discretion to cut off further inquiry on a critical issue) and simply applied an abuse of discretion standard "focusing on DC's failure to ask the challenged questions during group voir dire."

6. Disallowed Questions. *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988). Premeditated murder of wife; "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?"

a) Judge could preclude defense counsel from asking this question where "jury nullification" was motive.

b) Purpose. Voir dire should be used to obtain information for the intelligent exercise of challenges. R.C.M. 912(d) discussion.

c) Standard. A *per se* claim of relevance and materiality simply because a peremptory challenge is involved is not sufficient. The broad scope of challenges does not authorize unrestricted voir dire.

d) *See also United States v. Toro*, 34 M.J. 506 (A.F.C.M.R. 1991). Trial counsel improperly converted lengthy discourses on the history and mechanics of drug abuse, and on the misconduct of the accused and others, into voir dire questions by asking whether the members "could consider this information in their deliberations?"

7. "Feelings" of Court Member About an Issue or Offense. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). J. Johnston in concurring opinion indicates error to not allow DC to ask member how he "felt about the presumption of innocence."

8. Sanctity of Life Questions. *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989). In court-martial for the unpremeditated murder of accused's Filipino wife, there was no abuse of discretion when MJ allowed trial counsel to ask panel whether Asian societies place a lower premium on human life and to ask if any member opposes capital punishment.

9. Denial of questions tested for abuse of discretion.

a) *United States v. Pauling*, Army 9700685 (Army Ct. Crim. App. 15 July 1999) (unpub.). Military judge did not abuse his discretion in prohibiting defense counsel to ask, on voir dire, questions from a member concerning the impact of rehabilitative potential testimony.

b) *United States v. Belflower*, 50 M.J. 306 (1999). Military judge did not abuse his discretion in prohibiting individual voir dire by defense counsel of four members where defense did not ask any questions on group voir dire that would demonstrate the necessity for individual voir dire.

C. Challenges for Cause.

1. Liberally Grant Challenges!

a) *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). MJs are to liberally grant challenges for cause to insure that accuseds are tried by court members who are impartial as to findings and sentencing. *See also United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987).

b) But – "There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse of discretion, than in ruling on challenges for cause." *Smart* (above).

c) The *Moyar* mandate. *United States v. Moyar*, 24 M.J. 635, 638, 639 (A.C.M.R. 1987). "The issue of denial of challenges for cause remains one of the most sensitive in current military practice. . . . Military law mandates military judges to liberally pass on challenges. Notwithstanding this mandate . . . some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members."

d) **Danger Area – rating chain challenges.** *United States v. Wiesen*, 56 M.J. 172 (2001), *recon. denied*, 57 M.J. 48 (2002). During voir dire COL Williams, a brigade commander and the senior member, identified six of the ten members as his subordinates. The defense, arguing implied bias, attempted to challenge COL Williams. The military judge denied this causal challenge. In his majority opinion, Judge Baker concludes, "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." The CAAF invoked the liberal grant mandate and held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, the Court reversed the ACCA, and set the findings and sentence aside.

2. Actual and Implied Bias. *United States v. Minyard*, 46 M.J. 229 (1997). MJ should have granted challenge for cause against member whose husband investigated case against accused. A challenge for cause based on actual bias is resolved based on credibility. The MJ's credibility determination will be given great deference on review. A challenge for cause based on implied bias is reviewed under an objective standard viewed through the eyes of the public.

a) Standards:

(1) Challenge for cause based on actual bias involves an allegation that the member's bias will not yield to the military judge's instructions. This is a question of member's credibility and is reviewed for an abuse of discretion. Credibility determination is a *subjective determination* viewed through the eyes of the MJ. The MJ's opportunity to observe the demeanor of court members will be given "great deference" on appellate review.

(2) Challenge for cause based on implied bias is reviewed on an *objective standard* through the eyes of the public. Test: Would a reasonable member of the public have "substantial doubt as to the legality, fairness, and impartiality" of the proceedings?"

(3) Challenges for cause encompasses both actual and implied bias. *United States v. Armstrong,* 54 M.J. 51 (2000). LCDR T stated during voir dire that he worked with SA Cannon, the lead investigator in accused's case. SA Cannon sat at counsel table as a member of counsel team during trial and testified. LCDR T stated he was in intelligence and not law enforcement, that he had no personal involvement in accused's case but had heard it discussed in meetings. He said he could put that aside. The military judge denied the challenge for cause, finding no actual bias. Defense appealed alleging implied bias. The Coast Guard Court, exercising its *de novo* power of review, the court set aside the findings and sentence based upon implied bias. The government argued that the court should test only for plain error, the theory being that defense need not specifically invoke implied bias. The CAAF noted a challenge for cause under RCM 912(f)(1)(N) encompasses both actual and implied bias, and that the CG court did not err in applying RCM 912(f)(1)(N).

(4) *See also United States v. Napoleon,* 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, the military judge properly denied challenge for cause against member who had *official* contacts with special agent-witness who was "very credible because of the job he has," and knowledge of case through a staff meeting).

b) Cases Reviewing Actual and Implied Bias.

(1) *United States v. Strand,* 59 M.J. 455 (2004). Court member was son of officer who acted as convening authority in the case. The member's father acted to excuse and detail new members in the absence of the regular GCMCA. The defense did not challenge the son for cause. On appeal, the defense contended that the military judge had a *sua sponte* duty to remove the son for implied bias. The court held that the military judge did not abuse his discretion in declining to *sua sponte* excuse the member, and declined to adopt a *per se* "familial relationship" basis for excusal. Here, the government revealed the familial relationship, and the military judge allowed both parties a full opportunity to voir dire the member. Although the military judge may excuse an unchallenged member in the interest of justice, there must be

justification in the record for such a drastic action. The record in this case did not reveal an adequate justification for such action.

(2) *United States v. Miles,* 58 M.J. 192 (2003). MJ abused his discretion by failing to grant challenge for cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside. LESSON: "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate."

(3) *United States v. New*, 55 M.J. 95 (2001). This case, most noted for resolving the issue of who decides the 'legality' of an order, also raised the issue of the MJ's authority to deny defense challenges for cause. On appeal the defense argued that the MJ erred by denying their causal challenge against a member who previously ordered a subordinate to deploy to Macedonia. The court held there was no error. First, it deferred to the MJ on the issue of actual bias. Then it turned to the issue of implied bias and reasoned, "It is unlikely that the public would view all … who have ever given an order as being disqualified from cases involving disobedience of orders that are similar to any they may have given in the past."

(4) *United States v. Rockwood*, 52 M.J. 98 (1999). In a high profile case, some knowledge of the facts of the offense, or an unfavorable inclination toward an offense, in not per se disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairy and impartially on its merits. Here, the defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The CAAF concurred with the Army court's holding that there was no actual bias — members are not

automatically disqualified based on professional relationships with other members or with witnesses, and some knowledge of the facts or an unfavorable inclination toward and offense is not per se disqualifying.

(5) *United States v. Warden*, 51 M.J. 78 (1999). Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial.

(6) *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case the MJ erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, "but had gotten over it." The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

(7) *United States v. Lavender*, 46 M.J. 485 (1997). The implied bias doctrine will not operate to entitle an accused on trial for larceny to have the entire panel removed for cause after two members had money stolen from their unattended purses in deliberation room. The implied bias doctrine is only applied in rare cases. *See Hunley v. Godinez*, 784 F.Supp. 522 (N.D. Ill.), *aff'd*, 975 F.2d 316 (7th Cir. 1992) (Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Doctrine of implied bias appropriately applied to case of accused convicted of murder during course of burglary where judge denied challenges for cause against members who changed vote from not guilty to guilty after becoming victims of burglary during overnight recess from trial in sequestered hotel).

(8) *United States v. Youngblood*, 47 M.J. 338 (1997). Application of the implied bias standard is appropriate to determine whether a MJ abused his discretion in denying challenges for cause against court members based on counsel argument that members were affected by unlawful command influence. Prior to court-martial, each member attended a staff meeting where the convening authority and the SJA gave a presentation on standards, command responsibility, and discipline where the SJA and convening authority expressed dissatisfaction with a previous commander's disposition of an offense.

(9) *United States v. Rome*, 48 M.J. 467 (1998). MJ abused discretion by failing to grant a challenge for cause, based on implied bias, against member who MJ determined had engaged in unlawful command influence in previous unrelated court-martial and who defense counsel had personally and professionally embarrassed through cross examination in previous high-profile case. Member (LTC M) had a supervisory relationship with an enlisted member of panel, had professional relationship with trial counsel, and also relationship with special agent who was prosecution witness in addition to previous engagement in unlawful command influence. During voir dire, LTC M stated that he "knew defense counsel only from courts-martial" and that she "did a good job" in supporting her client. CAAF bases implied bias only on UCI situation (personal embarrassment via defense counsel "grilling"). Attempted robbery conviction reversed. Judge Crawford strongly dissents, noting again the majority's lack of faith in member rehabilitation, and questions whether commanders and senior NCO's can ever serve as court members.

(10) *United States v. Velez*, 48 M.J. 220 (1998). In a case involving two specifications of rape and two specifications of assault, the MJ did not err by failing, sua sponte, to remove three panel members on the basis of implied bias. The implied bias doctrine was not invoked because the record established the following: the member who admitted knowing one of the rape victims had a tenuous relationship with victim, disavowed that this relationship would influence him, and the defense failed to challenge the member on such grounds; second member disavowed that command relationship with Government rebuttal witness would influence him, and the defense counsel failed to challenge the member on that ground; the third member frankly disclosed that he had two friends who were victims of rape, and that he has a 15-year-old daughter he wanted to protect from rape, but disavowed improper influence and stated that he would follow the MJ's instructions.

(11) *United States v. Baum*, 30 M.J. 626 (N.M.C.M.R. 1990). MJ improperly denied two causal challenges: first member was the sergeant major of alleged co-conspirator who had testified at separate Article 32, was interviewed by chief prosecutor, and had voluntarily attended accused's Article 32 investigation; second member was colonel who headed depot inspector's office, had official interest in investigation, and had discussed cases with chief investigator and government `

(12) *United States v. Henley*, 53 M.J. 488 (2000). LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

(13) *United States v. Napolitano*, 53 M.J. 162 (2000). Where member indicated on questionnaire disapproval of civilian DC's behavior in another case, military judge did not abuse discretion in denying challenge for cause; member retracted opinion, stated he was not biased against CDC.

c) Disclosure of Potential Basis for Challenge for Cause.

(1) *United States v. Modesto*, 43 M.J. 315 (1995). TC failed to disclose that court member (Brigadier General) had dressed as a woman at Halloween Party. Member, upon being asked about dressing in costume as a female, failed to disclose information during voir dire. In trial of Colonel charged with conduct unbecoming (performing as female impersonator at gay club, sodomy with another male, indecent touching with another male, cross-dressing in public), reversal of conviction not warranted because incident did not constitute grounds for a challenge for cause or preclude effective voir dire. Testimony raised issue whether SJA may have told TC not to disclose information to

defense. Gov't should disclose information that might be a basis for a challenge for cause.

(2) *United States v. Dunbar*, 48 M.J. 288 (1998). When panel member questionnaire contains information that may result in disqualification, the defense must make reasonable inquiries into the member's background either before trial or during voir dire. The Government may not be required to provide the background for the disqualifying information in every situation. The accused was charged with dereliction of duty, conduct unbecoming an officer, and fraternization. A member's questionnaire revealed that she had testified as an expert witness in child-abuse cases prosecuted by the trial counsel. The defense failed to conduct voir dire on this issue. The defense waived the issue by failing to conduct voir dire after reviewing the questionnaire and then failing to exercise a causal or peremptory challenge. There was no additional affirmative requirement for the Government to disclose the information.

(3) *United States v. Taylor*, 44 M.J. 475 (1996). The accused was not entitled to relief based on an argument that the president of the panel, who was convicted of several sexual offenses against minor boys after accused's trial, failed to honestly answer general questions concerning fairness and impartiality. At the time of accused's trial, the president was not aware that he was under investigation, and there was no other evidence that his answers were untruthful. The accused, moreover, was unable to show how a correct response would have provided a basis for a challenge.

(4) Making the record. *United States v. Smith*, 30 M.J. 631 (N.M.C.M.R. 1990). MJ abused his discretion in limiting scope of voir dire to prevent defense counsel from developing possible grounds for disqualification of MJ. *See also United States v. Adams*, 36 M.J. 1201 (N.M.C.M.R. 1993). Reversible error to refuse defense counsel an opportunity to question prospective court members regarding their previous experiences with or expertise in drug urinalysis program and their beliefs about the reliability of the program.

d) Individual Attitudes.

(1) Findings.

(a) Urine test bias. *United States v. Dorsey*, 29 M.J. 761 (A.C.M.R. 1989). In case for cocaine use, defense asked,

"Does anyone feel that the accused needs to explain why his urine tested positive for cocaine?" All members replied yes. MJ properly denied challenges to all panel members based on members' responses to judge's inquiries concerning prosecution's burden of proof.

(b) Note that request for bench trial does not waive review of denied causal challenges; request for judge alone trial to avoid trial by challenged members preserves issue for appeal.

(2) Sentencing. Juries are not leaves swayed by every breath. Learned Hand, *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923).

(a) A member is not automatically disqualified just because she admits to an unfavorable inclination or predisposition toward a particular offense.

(b) The test is whether the member is "inflexible:" Will the member's personal bias yield to the evidence presented and the judge's instructions? *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). In barracks larceny case O5 member says he was inclined "to be very tough" on offenders; O4 says crime was "bordering on a despicable act" and he would be "disposed" to vote for a discharge. Both members evinced a willingness to keep an open mind.

(c) "Would you consider no punishment as a sentencing option?" *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993). Despite member's initial responses that he could not consider "no punishment" as an option where accused charged with rape, sodomy, and indecent acts, member's later responses showed he would listen to the evidence and follow the judge's instructions. Member's responses to defense counsel's "artful, sometimes ambiguous questioning" does not necessarily require that a challenge for cause be granted. *See also United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993), *aff'd*, 42 M.J. 168 (1995). Member indicated an officer convicted of conduct unbecoming should not be permitted to remain on active duty. Member stated she would follow guidance of MJ. Denial of CfC not abuse of discretion.

(d) *United States v. Greaves*, 48 M.J. 885 (A.F. Ct. Crim. App. 1998). Accused pleaded guilty to wrongful use of cocaine. MJ did not abuse his discretion by failing to grant a challenge for cause against member who stated during voir dire that "while he would keep an open mind, he thought that a sentence of no punishment would be an unlikely outcome, and, that in 99.9 percent of the cases, some punishment would be in order. The member did not express an inflexible attitude toward sentencing--he merely stated what is "patently obvious--while a sentence to no punishment is an option which should be considered, it is not often appropriate."

(e) *United States v. Giles*, 48 M.J. 60 (1998). MJ *clearly abused* his discretion by failing to grant a challenge for cause against a member who demonstrated actual bias by his inelastic attitude toward sentencing in a case involving attempted possession of LSD with intent to distribute and attempted distribution of LSD. While member indicated that he could consider all evidence and circumstances, and the full range of punishments, his statements, in response to defense questions, that anyone distributing drugs should be punitively discharged with a BCD, and that he had not heard of, or experienced any circumstance where a punitive discharge would not be appropriate, disqualified him under R.C.M. 912(f)(1)(N).

(f) Another Example: How many of you think cocaine abusers should be removed from the Air Force? *United States v. Mayes*, 28 M.J. 748 (A.F.C.M.R. 1989). Member had “general” bias against retention and rehabilitation of drug abusers; denial of challenge not error.

(g) Distinction between “general” and “specific” bias. *United States v. Collins*, 29 M.J. 778 (A.C.M.R. 1989). MJ abused discretion by not granting challenge against member who felt strongly that the term “rehabilitation” was a “cop-out” to get a lighter sentence and equated rehabilitation with temporary insanity--another defense that he “could not stand.” The court ordered a rehearing on sentence even though the member was peremptorily challenged and did not participate in sentencing. *But see Ross v. Oklahoma*, 487 U.S. 81 (1988).

(h) *United States v. Dale*, 42 M.J. 384 (1995). Member (06 president) in child abuse case indicated he was aware of sentence for child abuse in civilian system that was "excessively lenient." Member upon further questioning by MJ indicated he was not predisposed to any punishment in this case and assured the MJ he would follow the law and keep an open mind. (Sentence was 20 years).

(i) *United States v. Denier*, 43 M.J. 693 (A.F. Ct. Crim. App. 1995). In drug case member stated his daughter was a recovering cocaine addict and he would be fair, but he would still be affected some but not intellectually. No abuse of discretion to deny challenge for cause.

(j) *United States v. Schlamer*, 52 M.J. 80 (1999). Accused charged with pre-meditated murder of a female marine. One member disclosed her severe notions of punishment ("rape = castration;" "you take a life, you owe a life"). Nevertheless, she was adamant that she had not made up her mind in accused's case, that she believed in the presumption of innocence, and that she would follow the judge's instructions supported the CAAF's finding that the military judge did not abuse his discretion in denying the challenge. Similarly, the judge's grant of a government challenge against a member who had received an Article 15 and stated he would be "uncomfortable" judging the accused was within the judge's discretion and comported with the "liberal grant" mandate. *See also United States v. Napoleon*, 46 M.J. 279 (1997) (holding that under both actual and implied bias standard, MJ properly denied challenge for cause against member who had: *official* contacts with special agent-witness who was "very credible because of the job he has"; and knowledge of case through a staff meeting).

(k) *United States v. Rolle*, 53 M.J. 187 (2000). Accused, a Staff Sergeant, pleaded guilty to use of cocaine. Voir dire focused on whether the panel members could seriously consider the option of no punishment, or whether they felt a particular punishment, such as a punitive discharge, was appropriate for the accused. One member, CSM L stated "I wouldn't" let the accused stay in the military, and "I am inclined to believe that probably there is some punishment in order there . . . I very seriously doubt that he will go without punishment." (Although CSM L did note there was a difference between a discharge and an administrative

elimination from the Army). Another member, SFC W, stated "I can't [give a sentence of no punishment] . . . because basically it seems like facts have been presented to me because he evidentially [sic] said that he was guilty." The military judge denied the challenges for cause against CSM L and SFC W; the CAAF noted that "[p]redisposition to impose some punishment is not automatically disqualifying. *United States v. Jefferson*, 44 MJ 312, 319 (1996); *United States v. Tippit*, 9 MJ 106, 107 (C.M.A. 1980). "[T]he test is whether the member's attitude is of such a nature that he will not yield to the evidence presented and the judge's instructions." *United States v. McGowan*, 7 MJ 205, 206 (C.M.A. 1979). The CAAF found no error, noting the court was reluctant "to hold that a prospective member who is not evasive and admits to harboring an opinion that many others would share -- such as that a convicted drug dealer should not remain a noncommissioned officer or should be separated from the armed services -- must automatically be excluded if challenged for cause [citations omitted].'" The members did not express a predisposition toward a particular punishment but agreed to follow the military judge's instructions and to not completely exclude the possibility of no punishment. "[W]e have another case of responses to 'artful, sometimes ambiguous inquiries' that do not require the military judge to grant a challenge for cause [citations omitted]."

(l) Artful question or inflexible attitude? Judge should inquire and clarify on record.

(i) Are you aware that punishment can range from no punishment, to the slight punishment of a reprimand, all the way to a discharge and confinement?

(ii) Do you understand that you should not decide on a punishment until you hear all of the evidence?

(iii) Can you follow the court's instructions regarding the law?

(iv) Will you listen to all of the evidence admitted at trial, before deciding a sentence?

(v) Can you give this accused a full, fair, and impartial hearing?

(3) Misperception of Human Nature or Evidentiary Rules. *United States v. Ovando-Moran*, 48 M.J. 300 (1998). No abuse of discretion to deny challenge for cause against member who considered it unnatural if accused failed to testify. Court reasoned that MJ's explanation of accused's right to remain silent and member's statement that he would put preconceptions aside supported view that that member's "misperception" was not a personal bias against accused.

(4) Dislike of Counsel. *United States v. Grandy*, ARMY 2000258 (Army Ct. Crim. App. Jan. 12, 2004) (unpub.). MJ did not err by denying challenge for cause of member who provided answer on questionnaire to the effect that the first word or phrase that [came] to mind when he thought of defense attorneys was "leeches." On closer examination, member was referring to civilian practitioners "and the amount of money that they make, or more accurately, take from their clients." Member had no negative impression of TDS attorneys. No actual or implied bias.

(5) Capital Cases. *Adams v. Texas*, 448 U.S. 38 (1980). Juror may be challenged for cause when that juror's views about capital punishment would prevent or substantially impair the performance of their duties as a juror in accordance with the judge's instructions and the juror's oath. *See also Wainwright v. Witt*, 469 U.S. 412 (1985).

(a) *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989). The court affirmed a challenge for cause against a member because of his unwillingness to impose the death penalty even when it was not shown that he would never vote for death. There is no requirement to show that the panel member's bias is unambiguous or unmistakably clear.

(b) *Morgan v. Illinois*, 112 S.Ct. 2222 (1992). Trial in state court consisted of two phases, with the court conducting voir dire of the jury. The trial court's refusal to inquire whether potential jurors would automatically impose the death penalty is inconsistent with the Due Process Clause of the Fourteenth Amendment. If the defense requests such an inquiry, the court must inquire into the member's views on capital punishment.

(c) Under *Witherspoon*, exclusion of venire members must be limited to those who are "irrevocably committed . . . to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *United States v. Gray*, 51 M.J. 1 (1999): The court held the military judge did not abuse his discretion in granting challenges for cause against two members who voiced opposition to the death penalty. One member stated his chances of voting for death were "very remote;" the other stated he could never vote for the death penalty. The military judge properly applied the relevant test: "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

(6) Voir Dire and High Profile Cases. *United States v. Rockwood*, 48 M.J. 501 (Army Ct. Crim. App. 1998). In a high profile case, some knowledge of the facts of the offense, or an unfavorable inclination toward an offense, in not *per se* disqualifying. The critical issue is whether a member is able to put aside outside knowledge, association, or inclination, and decide the case fairly and impartially on its merits. The accused was convicted of various offenses arising out of issues related to Operation Uphold Democracy in Haiti. The defense challenged the entire panel based on the following: an acquittal would damage the reputation of the members individually, the general court-martial convening authority, and the 10th Mountain Division; several members knew key witnesses against the accused and would give their testimony undue weight; that members were exposed to and would be affected by pretrial publicity; and members evinced an inelastic attitude about a possible sentence in the case. The Army court held that there was no actual bias—members are not automatically disqualified based on professional relationships with other members or with witnesses, and some knowledge of the facts or an unfavorable inclination toward and offense is not *per se* disqualifying.

e) Victim Analysis.

(1) Considerations in victim analysis:

(a) Who was victim - panel member or a family member?

(b) Similar crime?

(c) Was crime unsolved?

(d) Traumatic? How many times a victim?

(e) Does the member give clear, reassuring, unequivocal answers about his impartiality?

(2) *United States v. Miles*, 58 M.J. 192 (2003). MJ abused his discretion by failing to grant challenge for cause based on implied bias where, during voir dire in guilty plea case involving wrongful use of cocaine, member revealed his ten-year old nephew died as a result of mother's pre-natal use of cocaine. Member described tragedy in article in base newspaper scheduled for publication shortly after court-martial. Trial counsel commented that event "evidently" was "a very traumatic experience" for the member. "We conclude that asking [the member] to set aside his memories of his nephew's death and to impartially sentence Appellant for illegal drug use was 'asking too much' of him and the system." Sentence set aside. LESSON: "Where a particularly traumatic similar crime was involved . . . we have found that denial of a challenge for cause violated the liberal-grant mandate."

(3) Member in a robbery case had been a robbery victim seven times. Another member, a two-time victim of burglary, indicated "(I)t's hard to say" if those prior incidents would influence his deliberations; it "might trigger something from the past, it may not." *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). Perfunctory claims of impartiality are not enough; challenge should have been granted to keep outcome "free from doubt.' *See also United States v. Fulton*, 44 M.J. 100 (1996). Member sitting for robbery and larceny case not disqualified based on fact that member was victim of burglary.

(4) Member in a rape case had been a larceny victim. *United States v. Smith*, 25 M.J. 785 (A.C.M.R. 1988). Challenge denied; any recent crime victim is not automatically disqualified.

(5) E8 member in aggravated assault case involving shooting at NCO Club had been caught in crossfire during similar incident 15 years earlier in off-post bar fight. *United States v. Hudson*, 37 M.J. 968 (A.C.M.R. 1993). Member's responses indicated that he could remain fair and impartial.

(6) *United States v.White*, ARMY 2001132 (Army Ct. Crim. App. Dec. 8, 2003) (unpub.). Appellant charged with attempted murder of wife; convicted of assault with intent to inflict GBH and other offenses. MJ abused discretion by denying challenge for cause of member whose wife was victim of domestic abuse by her first husband. Individual voir dire revealed wife suffered a broken neck from abuse; member stated that "I've told him, simply, that, 'If I ever see you and you look like you're going to raise a hand for her, I'm gonna kill you and then we'll sort it out later.' That's kind of the way I feel about it." While court found no abuse of discretion as to actual bias, the court found error as to implied bias. Note: MJ got less discretion on implied bias because he did not address that issue. "On these facts, an objective observer would likely question the fairness of the military justice system." Contested findings and sentence set aside.

(7) *United States v. Mack*, 36 M.J. 851 (A.C.M.R. 1993), *aff'd after Dubay inquiry*, 16 February 1996, No. 9102134 (mem. op.). Officer member in an assault case failed to disclose that he had been held at gunpoint, tied up, and threatened with death during armed robbery thirty years earlier. Member indicated that he had "forgotten about it." Returned for *DuBay* hearing to determine (1) was there a failure to honestly answer a material question?; (2) would the correct (honest) response provide a valid basis for challenge for cause?

(8) Member in a barracks larceny case had been victim of four larcenies. *United States v. Campbell*, 26 M.J. 970 (A.C.M.R. 1988). Challenge should have been granted based on equivocal responses.

(a) Member "waffled" in response to questions about his impartiality.

(b) "Would try to be open-minded, somewhat objective, but 'not sympathetic to thieves.'" Could not have same approach as someone who has not been a victim.

(9) Larceny of ATM card and money; member's wife had been victim of a similar crime. *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989). Not error to deny challenge based on judge's inquiry, unequivocal responses, and judge's findings;

(10) Larceny victim. *United States v. Basnight*, 29 M.J. 838 (A.C.M.R. 1989). Member was victim of three larcenies and his

parents victims of two larcenies. Denial of challenge for cause proper in light of member's candor and willingness to consider complete range of punishments.

(11) Indirect Victim.

(a) *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case the MJ erred in failing to grant a defense challenge for cause against a member who stated that her sister had been abused by her grandfather, and was shocked when she first heard of her sister's allegations, but had gotten over it. The member's responses to the MJ's rehabilitative questions regarding her ability to separate her sister's abuse from the evidence in the trial were not "resounding."

(b) Friends as victim v. family members as victim. *United States v. Henley*, 53 M.J. 488 (2000). LtCol M was asked questions about his friendship with two individuals who were victims of sexual abuse. Neither friend was abused as a child. LtCol M said he could put aside his knowledge of his friends' background and judge the accused based solely on evidence presented. DC also challenged LtCol M because he said he believed someone with an extensive collection of pornography probably had a "fixation or something of that nature." But he also stated that he would not convict anyone of a sexual offense solely because they possessed large quantities of pornography. Military judge did not err in denying challenge for cause. There was neither actual or implied bias on the part of the member. "There is a substantial difference between a court member who has "friends" who were victims or who may know a victim of a crime and a member who may have had "family" as a victim of a crime."

f) Rating Chain Challenge. One member is the rater of another member of the panel.

(1) *United States v. Wiesen*, 56 M.J. 172 (2001), *recon denied*, 57 M.J. 48 (2002). Sergeant Wiesen was convicted of two specifications of attempted forcible sodomy with a child, indecent acts with a child, and obstruction of justice by an enlisted panel. He was sentenced to a dishonorable discharge, confinement for 20 years, total forfeitures, and reduction to the lowest enlisted grade. During *voir dire* COL Williams, a brigade commander and the

senior member, identified six of the ten members as his subordinates. The defense, arguing implied bias, attempted to challenge COL Williams. The military judge denied this causal challenge. The defense then used their peremptory challenge to remove COL Williams, but preserved the issue for appeal by stating, "but for the military judge's denial of [our] challenge for cause against COL Williams, [we] would have peremptorily challenged [another member]." In his majority opinion, Judge Baker concludes, "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system." The CAAF held "the military judge abused his discretion when he denied the challenge for cause against COL Williams." Finding prejudice, the Court reversed the ACCA, and set the findings and sentence aside.

(2) *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988). Rating chain relationship is not an automatic disqualification. Careful inquiry of both parties is necessary.

(3) *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985). "Inconvenience, however, is not an adequate ground to deny a challenge for cause."

(4) *United States v. Garcia*, 26 M.J. 844 (A.C.M.R. 1988). Rating relationship merits inquiry and appropriate action based on members' responses.

(5) Obligation is on the party making the challenge to conduct the inquiry into any rating chain relationships. A *sua sponte* challenge by the military judge is not required. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991).

(6) *See also United States v. DeNoyer*, 44 M.J. 619 (Army Ct. Crim. App. 1996). Identification of supervisory or rating chain relationship not enough to support individual member questioning. After defense asked panel in excess of 25 questions, some repetitious, in various areas, and then identified possible rating or supervisory relationships among 5 of the 9 members, MJ denied defense request for individual voir dire. No abuse of discretion by denying defense request for individual voir dire. The Army court, however, cautions that granting defense requests would have eliminated appellate issues and enhanced perception of fairness.

g) Knowledge.

(1) "When the peremptory challenges were all exhausted, a jury of twelve men were impaneled-a jury who swore that they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the indians in the sage brush and the stones in the street were cognizant of." Mark Twain, *Roughing It*, 1872.

(2) Member knows a witness.

(a) *United States v. Ai*, 49 M.J. 1 (1998). The MJ did not abuse his discretion in denying a challenge for cause against a member who was a friend and former supervisor of a key government witness. In a graft case, during voir dire, an officer member revealed that a key government witness had previously worked for him as a food manager for one year three years ago. The member indicated, during group and individual voir dire, that the relationship would not affect him as a member and he would follow all MJ instructions. The CAAF recognized that while R.C.M. 912(f)(1)(N) is broad enough to permit a challenge for cause against a member on the basis of favoring witnesses for the prosecution, there was no "historical basis" in the record to support the challenge. The work relationship was limited in duration, negating any inference of predisposition.

(b) *United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Member who had seen witness in another trial and formed opinion as to credibility should have been excused. The mere fact that a witness had appeared before the member in another case is not grounds by itself to grant a challenge; if so, this would virtually prohibit the repeated use in different trials of witnesses such as police officers and commanders.

(c) *United States v. Napoleon*, 46 M.J. 279 (1997). The MJ properly denied a challenge for cause against a member who had: official contacts with special agent-witness. Member knew local OSI detachment commander and stated that witness was "very credible because of the job he has . . .," had worked with witness on some other cases, would want him in his organization, but would follow judges

instructions and would not automatically believe the witness.

(d) Read a list of anticipated witnesses to the members.

(3) Member is a witness. *United States v. Perez*, 36 M.J. 1198 (N.M.C.M.R. 1993). Three officer members stated during voir dire that they observed "stacking incident" (assault on a warrant officer). N.M.C.M.R. overturns findings and sentence. Potential witnesses in case should have been excused for cause.

(4) Member knows about pretrial agreement. *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Knowledge of pretrial agreement does not per se disqualify the court member. Whether the member is qualified to sit is a decision within the discretion of the MJ.

(5) Member's Outside Investigation. *United States v. Nigro*, 28 M.J. 415 (C.M.A. 1989). In a bad check case, MJ properly denied challenge for cause against member who called credit union to ask about banking procedures. Member's responses to inquiries were clear and unequivocal that he could remain impartial and follow judge's instructions.

(6) Member knows Trial Counsel. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994). MJ denied challenges for cause against three officer members who had been past legal assistance clients of assistant trial counsel. Professional relationship not a per-se basis for challenge. Members provided assurances of impartiality.

(7) Distant knowledge of accused's sanity report. *United States v. Dinatale*, 44 M.J. 325 (1996). In an indecent acts on minors case, the MJ did not clearly abuse his discretion by denying a challenge for cause against a member (Chief of Hospital Services at the local military hospital) where voir dire supported the conclusion that the member's review of sanity report was limited to reading the psychologist's capsule findings, member did not recall seeing accused's report, member stated that she could decide the case based on the evidence and MJ instructions, and mental state of accused was not an issue at trial.

(8) Experience with Key Trial Issues. *United States v. Daulton*, 45 M.J. 212 (1996). In a child sexual abuse case, the MJ did not abuse his discretion by denying a defense challenge for cause

against a member who was a medical doctor with psychiatric training and clinical experience involving child sexual abuse victims, and who indicated that "it bothered her that children would have to testify in public about the abuse they had experienced." The member's responses to the MJ's questions showed that she would keep and open mind, and perform her duties with fairness and impartiality.

h) Member's Position and Experience. *United States v. Lattimore*, 1996 WL 595211 (A.F. Ct. Crim. App. 1996) (unpub.). In case involving stealing and use of Demerol, no abuse of discretion to deny challenge for cause against 06-member who was a group commander; former squadron commander; had preferred charges in 3-4 courts-martial; recently forwarded charges of drug use; sat through portion of expert forensic toxicologist in unrelated drug case; and who indicated that, although not predisposed to give punitive discharge, some form of punishment was appropriate if accused was found guilty, but would consider sentence of no punishment. No per se exclusion for commanders and prior commanders who have preferred drug charges.

i) Panel Members and Questions. UCMJ art. 46; R.C.M. 703(a); R.C.M. 801(c). *United States v. Hill*, 45 M.J. 245 (1996). The fact that panel members ask an exceptionally large number of questions does not necessarily reflect a lack of impartiality and establish a basis for a challenge for cause. Panel members submitted approximately 125 "member questions," many containing multiple questions. Of the 125 questions, the president submitted 53. The member questions reflected a thorough immersion in the trial and attentiveness to the testimony and issues. Findings reflected precision (accused fully acquitted of half the charges) and sentence imposed for larceny, wrongful appropriation, receipt of stolen property, and wrongful possession of pistol was not harsh (BCD, 1 year confinement, total forfeitures, reduced to E-1).

j) Combination of Biases.

(1) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). Accused charged with wrongful distribution of cocaine. Member was a friend of the accused's company commander, had a degree in criminology, and had a brother-in-law who overdosed on cocaine.

(a) Judge should first ask if TC opposes challenge before ruling.

(b) An experienced prosecutor may join in the challenge to avoid needless appellate issues and the risk of reversal on

appeal, and to keep the outcome of the trial "free from doubt."

(c) The record. The judge questioned the member closely and extensively, assessed his credibility, and determined that he could properly serve as a panel member.

k) *United States v. Carns*, 27 M.J. 820 (A.C.M.R. 1988). Member worked in bad check office and rater was government witness in bad check case. Question of bias is essentially one of credibility and demeanor; due to his superior position, judge's determination of bias is entitled to great deference.

l) Challenges During Trial.

(1) Although challenges to court members are normally made prior to presentation of evidence, R.C.M. 912(f)(2)(B) permits a challenge for cause to be made "at any other time during trial when it becomes apparent that a ground for challenge may exist." Peremptory challenges may not, however, be made after presentation of evidence has begun.

(2) *United States v. Camacho*, 58 M.J. 624 (N-M. Ct. Crim. App. 2003). During lunchbreak after completion of Government case on merits and rebuttal, President of panel overheard stating to government witness, "It's execution time," and making certain gestures, "including a vulgar one with his finger." Challenge for cause granted, which left only two members in this BCD Special CM. Four new members were detailed, two of whom remained after voir dire and challenges. Remaining members were read all testimony without original members present. HELD: Affirmed. NOTE: "Of great importance in this case is the fact that the defense offered no objection to the detailing of new members and the reading of testimony to those members . . .."

(3) *United States v. Bridges*, 58 M.J. 540 (C.G. Ct. Crim. App. 2003). After findings, DC moved to impeach findings due to unlawful command influence (SJA email reporting child sex abuse case). DC claimed that, had she known of email, she would have questioned members about it and "might have elicited some information as to bias." BUT, DC did not challenge any member for cause at that time or specifically ask the military judge to permit additional voir dire on the issue. HELD: email on its own not "an apparent ground for challenge for cause." As such, MJ did not abuse his discretion by failing to sua sponte reopen voir dire.

(4) *United States v. Lambert*, 55 M.J. 393 (2001). Right after the members returned a verdict of guilty to one specification of indecent assault, the CDC asked the MJ to allow voir dire of the members because one member took a book titled Guilty as Sin into the deliberation room. The MJ conducted voir dire of the member who brought the book into the deliberation room, but did not allow the defense an opportunity to conduct voir dire. Analyzing the issue under an abuse of discretion standard, the court held that under the circumstances the MJ asked adequate questions and did not err by declining to allow DC to voir dire the members

(5) *United States v. Millender*, 27 M.J. 568 (A.C.M.R. 1988). During break in court-martial, member asked legal clerk if it would be possible to learn the "other sentence." Challenge denied; no exposure to extra-judicial information which could influence deliberations.

(a) Legal clerk did not answer member's question.

(b) Immediately reported to judge who investigated contact and found no outside information.

(6) Member recognizes a witness. *United States v. Warden*, 51 M.J. 78 (1999). Military judge did not abuse his discretion when he denied a challenge for cause against member who, mid-way through trial, announced that he knew one of the government witnesses, that she was the wife of a soldier who had worked for him at a prior duty station. The member stated he would "have faith" in the testimony of the witness' husband (who was also to testify) but stated he would weigh all the evidence. The court found no actual bias, and found that the record did not reasonably suggest implied bias. As to actual bias, the court found the member's dialog with the judge and counsel showed his concern with being fair and that he was capable of weighing the evidence objectively. Concerning implied bias, there was no evidence that their relationship was anything other than official, and the member's candor and concern enhanced the perception that the accused received a fair trial. *See also United States v. Arnold*, 26 M.J. 965 (A.C.M.R. 1988). Conduct individual voir dire to test for bias.

m) Challenges After Trial.

(1) *United States v. Humpherys*, 57 M.J. 83 (2002). Defense submitted post-trial motion for new trial based on discovery that two members were in same rating chain, although both answered MJ question on that issue in the negative. MJ held post-trial 39(a) session and questioned members, during which both responded that they did not remember the MJ asking the question and their answers were not an effort to conceal the rating chain relationship. MJ concluded responses during trial were "technically . . . incomplete," but responses caused him to conclude he would not have granted a challenge for cause based on the relationship, and denied motion for new trial. HELD: affirmed. In order to receive new challenge based on panel member's failure to disclose info during voir dire, defense must make two showings: (1) that a panel member failed to answer honestly a material question on voir dire; and (2) that a correct response would have provided a valid basis for a challenge for cause. "[A]n evidentiary hearing is the appropriate forum in which to develop the full circumstances surrounding each of these inquiries." Appellate court's role in process is to "ensure MJ has not abused his or her discretion in reaching the findings and conclusions." Here the MJ did not abuse his discretion where he determined that "full and accurate responses by these members would not have provided a valid basis for a challenge for cause against either or both."

(2) *United States v. Dugan*, 58 M.J. 253 (2003). MJ refused to grant post-trial 39(a) session to voir dire members concerning UCI in deliberations. CAAF remands for *Dubay* hearing. Under these circumstances, MRE 606(b) "permits voir dire of the members regarding what was said during deliberations about 'the alleged UCI comments of a commander], but the members may not be questioned regarding the impact of any member's statements or the commander's comments on any member's mind, emotions, or mental processes.

3. Timing of Challenges. UCMJ art. 41.

a) UCMJ art. 41(a). If exercise of challenge for cause reduces court below minimum required, the parties shall exercise or waive all other causal challenges *then apparent*. Peremptories will not be exercised at this time. *See United States v. Dobson*, ARMY 20000098 (Army Ct. Crim. App. Aug. 20, 2004) (unpub.). Use of challenges for cause reduced the panel below one-third enlisted but not below quorum. The MJ then allowed the parties to exercise their peremptory challenges interpreting

Article 41(a)(2) to limit the use of peremptory challenges only when the court fell below quorum but not when the court membership fell below one-third enlisted. ACCA held "assuming arguendo" that error occurred the error was administrative and not jurisdictional.

b) UCMJ art. 41(b). Each party gets one peremptory. If the exercise of a peremptory reduces court below the minimum required, the parties must use or waive any remaining peremptory challenge against the remaining members of the court *before* additional members are detailed to the court.

c) UCMJ art. 41(c). When additional members are detailed to the court, the parties get to exercise causal challenges against those new members. After causal challenges are decided, each party gets one peremptory challenge against members not previously subject to a peremptory challenge.

d) What about the members who have already been subjected to voir dire? Do they have to sit through the voir dire session with the new members?

(1) No. Under RCM 912(d), the military judge may excuse the original members while voir dire of the newly-detailed members occurs. Cf. RCM 805(b).

4. Preserving Denied Causal Challenges - the ***"But For"*** Rule from R.C.M. 912(f)(4).

a) *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). COMA translates R.C.M. 912 (f)(4) as follows:

(1) If you don't exercise your peremptory challenge, you waive your objection to the denied causal. You preserve your denied causal if you use your peremptory against any member of the panel.

(2) If you use your peremptory against the member you unsuccessfully challenged for cause and fail to state the "but for" rule, you waive your objection to the denied causal. So...,

(3) You preserve your denied causal if you use your peremptory against the member you unsuccessfully challenged for cause and you state the "but for" rule.

b) *Ross v. Oklahoma*, 487 U.S. 81 (1988). Defense had to use peremptory challenge to remove juror who should have been excused for

cause; no violation of Sixth Amendment or due process right to an impartial jury. "Error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."

c) *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990). Defense intended to challenge COL X, but had to challenge LTC Y because of previously denied causal challenge against LTC Y. Denied challenge for cause properly preserved.

(1) Removal of the "objectionable" member did not cure the error of the improperly denied causal.

(2) A rule to the contrary would force an accused to leave the member on the panel just to allow appellate review.

(3) Adopts Army court's view (Contra *Ross* (above) that peremptorily excusing challenged member does not resolve error. *United States v. Anderson*, 23 M.J. 894 (A.C.M.R. 1987).

d) *See also United States v. Eby*, 44 M.J. 425 (1996). The defense failed to preserve for appeal the issue of prejudice under R.C.M. 912(f)(4) by using its peremptory challenge against a member who survived a challenge for cause without stating that the defense would have peremptorily challenged *another member* if the MJ had granted the challenge for cause.

e) Proposed Amendment to R.C.M. 912(f)(4) (waiver).

(1) Language. Delete the sentence dealing with preserving denial of a challenge for cause, i.e. "However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted." Insert immediately after the words "When a challenge for cause has been denied" the words, "the successful use of a peremptory challenge by either party, excusing the member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review."

(2) Analysis. "This amendment is consistent with the President's lawful authority to promulgate a rule that would result in placing before the accused the hard choice faced by defendants in federal district courts-to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury." *See United States v. Miles*, 58 M.J. 192 (2003) (Crawford, C.J., dissenting). *See also United States v. Williams*, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. May 20, 2003) (unpub.). HELD: although the military judge abused his discretion in granting TC challenge for cause against disabled member over DC objection, error harmless. "An erroneous ruling on a challenge for cause does not automatically violate the right to an impartial jury . . . If the court members who heard the case were impartial, the right is not violated." *But see United States v. Armstrong*, 54 M.J. 51 (2000) (rejecting harmless error analysis where denial of challenge for cause results in use of peremptory challenge to excuse member); *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990).

D. Peremptory Challenges.

1. Normally, One Per Side. Additional Peremptory. *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988). Judge denied defense request for additional peremptory after panel was "busted" and new members were appointed.

2. *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000). Peremptory challenges do not have a constitutional foundation.

3. No Conditional Peremptory Challenges. *United States v. Newson*, 29 M.J. 17 (C.M.A. 1989). It was improper for judge to allow trial counsel to "withdraw" peremptory challenge after defense counsel reduced enlisted membership below one-third quorum.

4. *United States v. Pritchett*, 48 M.J. 609 (A.F. Ct. Crim App. 1998). The MJ erred to the prejudice of the accused by denying the accused his statutory right to exercise a peremptory challenge against one of the new court members added after the original panel as supplemented fell below quorum. In a forcible sodomy and indecent liberties with a child case, the panel twice fell below quorum. After the third voir dire, the military judge denied both sides the right to exercise peremptory challenges. The defense implied that it desired to exercise the challenge and the MJ replied "*I don't want to hear anymore about it. I ruled.*" The exercise of a peremptory challenge is a statutory right. Deprivation of that right carries a presumption of prejudice, absent other evidence in the record, requiring automatic reversal.

5. Discriminatory Use of Peremptory Challenge.

a) *Batson v. Kentucky*, 476 U.S. 79 (1986). Prosecutor's use of peremptories to exclude minority members based solely on their race violated Equal Protection Clause. Scenario: *Batson* was triggered by prosecutor's peremptory challenge of member who was of same racial minority group as accused. If defense objected, prosecutor required to give a race neutral explanation for the challenge.

b) Accused and juror need not be of same racial group to trigger *Batson*. *Powers v. Ohio*, 111 S. Ct. 1366 (1991). "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely be reason of their race. . . ."

(1) The Court's holding removes the requirement from *Batson* that the accused and challenged juror be of the same race.

(2) Court's ruling in *Powers* is very broad. Focuses on both the rights of the accused as well as the challenged member. Result is that ruling can include prosecutor's racially based challenges to *non-minority* members.

(3) Prosecutors must now be prepared to articulate a race-neutral reason for all peremptory challenges, regardless of the races of the accused/member.

c) *Batson* applies to the military. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (equal protection right to be tried by a jury from which no racial group has been excluded is part of due process and applies to courts-martial through the Fifth Amendment): "In our American society, the Armed Services have been a leader in eradicating racial discrimination." Government's use of only peremptory challenge against minority court member raised *prima facie* showing of discrimination. Court noted no right to a representative cross section of population in a jury panel exists in a court-martial. (Reaffirmed UCMJ art. 25 selection criteria.)

(1) *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989). *Per se* rule. *Batson* is triggered automatically when trial counsel challenges a member of a minority accused's racial group. There is no requirement for the defense, unlike in civilian courts, to make a prima facie showing of discrimination.

(2) *Batson* applies to defense. *United States v. Witham*, 47 M.J. 297 (1997) (holding *Batson* applicable to defense in courts-martial); *Georgia v. McCollum*, 112 S.Ct. 2348 (1992) (holding that the *Constitution* prohibits a civilian criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges). If the government can show a prima facie case, the burden shifts to the defense to provide a race neutral reason for their peremptory challenge.

(3) *Batson* applies to both sides in civil cases. *Edmonson v. Leesville Concrete Co.*, 505 U.S. 42 (1991). *Batson* applies to both parties in civil litigation. At issue here was the use of two peremptory challenges by the defense against two jurors of the same racial minority group as plaintiff.

(4) When Do *Batson* and *Powers* apply? After *Powers* and *Witham*, trial counsel and defense counsel must, upon objection by the opponent, be prepared to provide a race-neutral explanation for all peremptory challenges. Requires counsel objection to the challenge.

(5) What Are "Racially Neutral Reasons?" *United States v. St. Fort*, 26 M.J. 764 (A.C.M.R. 1988). Trial counsel's peremptory challenge of black female member in attempted adultery trial based on prior experience that member was "a little too sympathetic" towards those accused of crimes was race neutral. *See also Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1364 (1991). "an explanation based on something other than the race of the juror. . . Unless a discriminatory intent is inherent in the prosecutors explanation the reason offered will."

(a) *United States v. Clemente*, 46 M.J. 715 (A.F. Ct. Crim. App. 1997). Trial counsel's use of peremptory challenge to remove only Filipino member of panel because member was scheduled to go on leave during the trial was race neutral. Defense counsel acquiesced in objection by stating that "it would accept it and was ready to go ahead and continue."

(b) *United States v. Williams*, 44 M.J. 482 (1996). Accused and senior officer member of panel were members of the Masons. Peremptory challenge based on "fraternal affiliation" is race-neutral.

(6) Trial counsel's reasons should be supported by the record of voir dire.

(a) Hunches and Guesses: *Purkett v. Elem*, 115 S. Ct. 1769 (1995) (Per Curium). Missouri prosecutor struck two black men from panel because – "I don't like the way they looked," and they "look suspicious to me." Supreme Court OK's this is a legitimate hunch. Batson process does not demand explanation that is "persuasive or even plausible;" only facial validity (as determined by trial judge) is required.

(b) *Purkett and courts-martial. United States v. Tulloch*, 47 M.J. 283 (1997). The differences between the military and civilian manner of selecting members to sit on a panel/jury requires a different standard for assessing the validity of a trial counsel's proffered race-neutral explanation for a peremptory challenge under *Batson*. When a convening authority designates a servicemember as "best qualified" under art. 25, UCMJ, the trial counsel may not strike that person on the basis of a proffered reason that is unreasonable, implausible, or that otherwise makes no sense.

(c) Protecting Quorum? *United States v. Hurn*, 55 M.J. 446 (2001). The DC objected after the TC exercised the government's peremptory challenge against the panel's only non-Caucasian officer on the panel. The TC's said his basis "was to protect the panel for quorum." The CAAF held the reason proffered did not satisfy the underlying purpose of *Batson v. Kentucky*, 476 U.S. 79 (1986), *United States v. Moore*, 28 M.J. 366 (1989), and *United States v. Tulloch*, 47 M.J. 283 (1997),which is to protect the participants in judicial proceedings from racial discrimination. *United States v. Hurn*, 55 M.J. 446 (2001). Case remanded for *Dubay* hearing based on trial counsel's affidavit, filed two and one-half years after trial, which set forth additional reasons for challenging the member in question.

(d) *Post-Dubay: United States v. Hurn*, 58 M.J. 199 (2003). Trial counsel testified he also removed member, the only Non-caucasian on panel, because member had expressed concern about his "pressing workload." MJ determined challenge was race-neutral. CAAF affirmed,

finding no "clear error." What about Green – mixed motive not okay?

(e) Occupation? *United States v. Chaney*, 53 M.J. 383 (2000). The government used its peremptory challenge against the sole female member. After a defense objection, TC explained that member was a nurse. Military judge interjected that in his experience TCs "rightly or wrongly" felt members of medical profession were sympathetic to accuseds, but that it was not a gender issue. Defense did not object to this contention or request further explanation from TC. CAAF upheld the military judge's ruling permitting the peremptory challenge, noting that the military judge's determination is given great deference. CAAF noted it would have been preferable for the MJ to require a more detailed clarification by TC, but here DC failed to show that the TC's occupation-based peremptory challenge was unreasonable, implausible or made no sense.

(f) *United States v. Bradley*, 47 M.J. 715 (A.F. Ct. Crim. App. 1997). Accused charged with rape and assault. Trial counsel's exercise of peremptory challenge against one of two female panel members based on fact that member challenged was investigating officer on a case involving the legal office was gender-neutral and valid under *Batson*, and did not require MJ to grant defense request for additional voir dire to explore the basis of the trial counsel's supporting reason. Neither *Witham* nor *Tulloch* elevate a peremptory challenge to the level of a causal challenge (party making peremptory challenge need only provide a race neutral explanation in response to a *Batson* challenge).

(g) *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) (Cox, J.,). "[T]he judge must determine whether trial counsel articulated a neutral explanation ***relative to this particular case***, giving a clear and reasonably specific explanation of the legitimate reasons to challenge this member."

(h) *United States v. Norfleet*, 53 M.J. 262 (2000). TC challenged the sole female member of the court and, in response to DC's request for a gender-neutral explanation, stated the member "had far greater court-martial experience than any other member" (and would dominate the panel), and she had potential "animosity" toward the SJA office.

Failure of the MJ to require TC to explain "disputes" between member and OSJA was not abuse of discretion. When proponent of peremptory challenge responds to Batson objection with 1) a valid reason and 2) a separate reason that is not inherently discriminatory and on which opposing party cannot demonstrate pretext, denial of Batson may be upheld on appeal.

(i) *United States v. Robinson*, 53 M.J. 749 (Army Ct. Crim. App. 2000). Trial counsel's proffered reason for striking minority member (that he was new to the unit and that his commander was also a panel member) was unreasonable. Counsel did not articulate any connection between the stated basis for challenge and the member's ability to faithfully execute the duties of a court-martial member. Sentence set aside.

(j) *United States v. Shelby*, 26 M.J. 921 (N.M.C.M.R. 1988). TC peremptorily challenged junior black officer in sodomy trial of black accused. Inexperience (junior member) was accepted racially-neutral explanation, even though other junior enlisted members remained.

(k) Learning experience. *United States v. Curtis*, 28 M.J. 1074 (N.M.C.M.R. 1989). TC challenged black member who stated that serving on court-martial in a capital case would be a good "learning experience." Upheld as a racially-neutral explanation.

(l) *United States v. Dawson*, 29 M.J. 595 (A.C.M.R. 1989). Educational background in criminal justice, junior status on the panel, and lack of experience (officer challenged was member of accused's race and female) was supported by voir dire and valid basis for challenge.

(m) *United States v. Greene*, 36 M.J. 274 (C.M.A. 1993). Two reasons for exercise of peremptory challenge: one reason was facially valid and race-neutral; the second amounted to a "gross racial stereotype" and was clearly not race neutral. Held: where part of the reason for a challenge is not race neutral, the entire reason must fail. Reversed; findings and sentence set aside.

(n) *United States v. Woods*, 39 M.J. 1074 (A.C.M.R. 1994). TC says "(w)e just did not get the feeling that SSG Perez

was paying attention and would be a good member for this panel. It had nothing to do with the fact that his last name was Perez. I mean there is no drug stereotype here (emphasis added)." ACMR panel says TC's motive (inattentiveness) was not mere pretext for intentional discrimination.

(o) *United States v. Gray*, 51 M.J. 1 (1999). Military judge erred in not requiring counsel to articulate a "race-neutral" explanation for the Government's use of its peremptory challenge against one of only two black panel members. The trial counsel did, however, provide a statement at the next court session, stating a race-neutral explanation for the challenge (claiming the member's responses concerning the death penalty were equivocal). Trial counsel's statement provided a sufficiently race-neutral explanation for the challenge, and the court found that public confidence in the military justice system had not been undermined. The military judge is required to make a determination as to whether trial counsel's explanation was credible or pretextual and, optimally, an express ruling on this question is preferred. However, here the military judge clearly stated his satisfaction with trial counsel's disavowal of any racist intent in making the challenge.

d) Gender Based Peremptory Challenges. *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994). The Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender. Ruling extends the concept that private litigants and criminal defense attorneys are "state actors" (*See Edmonson v. Leesville Concrete* [above] and *Georgia v. McCollum* [above]) during voir dire for purposes of Equal Protection analysis. Dissent by J. Scalia notes that by ending of hunches, guesses, looks, gestures, body language, and gut instinct. "[W]e force lawyers to articulate what we know is often inarticulable." *See also United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993); Prosecutor claimed that he used peremptory challenges against two single females because he thought they "would be attracted to the defendant" because of his good looks. Ninth Circuit says this was gender based discrimination. Single men on panel were not challenged.

(1) *United States v. Witham*, 47 M.J. 297 (1997). Gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused. *See J.E.B. v. Alabama ex. rel. T.B.*, 114 S.Ct. 1419 (1994) (The Equal Protection Clause prohibits litigants from striking potential jurors solely on the basis of gender) and *Georgia v. McCollum*, 505 U.S.

42 (1992) (the *Constitution* prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of a peremptory challenge).

(2) *United States v. Ruiz*, 49 M.J. 340 (1998). The *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989) *per se* rule is applicable to Government peremptory challenges based on gender whether a MJ requests a gender neutral reason or not. The accused was convicted of adultery and fraternization. During the trial, the defense counsel made a *Batson* objection to the Government's peremptory challenge against the only female member of the panel. The trial court declined to require the Government to state the basis for the peremptory because it believe that *Batson* did not apply to gender (and the court did not have the benefit of the *J.E.B.* decision). The government submitted a post-trial affidavit which stated that its peremptory challenge was based on the fact that the member was a contracting officer, and trial counsel believed contracting officers held the government to a very high standard of proof. The CAAF modifies the lower court application of *Batson* by holding that, while some situations may preclude raising a rational *Batson* issue, MJs should normally require the party making a peremptory challenge against a female court member to provide a reason supporting that challenge.

e) Peremptory challenges based on white ethnic origin may violate *Batson. Rico v. v. Leftridge-Byrd*, 340 F.3d 178 (3d. Cir. 2003). *Batson v. Kentucky* prohibits peremptory challenges of *white jurors* based on ethnic origin. In this murder and conspiracy case tried in Philadelphia, the prosecutor used seven of his twenty peremptory challenges to strike Italian-Americans from the jury. Whether *Batson* applies to a white ethnic group depends on whether the group is a cognizable group that has been or is currently subjected to discriminatory treatment, a question of fact for the trial judge. Applying *Batson* to the challenges at issue, the court determined that the prosecutor offered race-neutral explanations for the challenges, and denied the petition for writ of habeas corpus.

f) Peremptory based on prior misconduct proper. *United States v. Allen*, 59 M.J. 515 (N-M Ct. Crim. App. 2003). Government challenged officer panel member for cause "based on the fact he had previously been a criminal accused in a military justice case and, therefore, would likely hold the Government to a higher standard of proof than required by law." Military judge denied challenge for cause; government exercised its peremptory against the same member; defense made *Batson* objection; government gave same reason for peremptory as for challenge for cause. HELD: government articulated a race neutral, reasonable, plausible reason for challenge that otherwise made sense. Fact that government

could have used peremptory to challenge another member whose challenge for cause was also denied did not make its exercised challenge one that did not make sense.

g) Peremptory challenges based on marital status do not violate *Batson*. *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 117 L. Ed. 2d 151 (1992).

h) Peremptory challenges based on age do not violate *Batson*. *Bridges v. State*, 695 A.2d 609 (Md. Ct. Spec. App. 1997). Prosecutor's peremptory challenges against jurors based on fact that they were around or under age 30 do not require explanation and did not violate *Batson*. *Batson* only applies to classifications subject to strict or heightened scrutiny. Age falls into the classification subject to *rational basis scrutiny*.

i) *Batson* Based on Religion and Religious Affiliation. The Supreme Court has not ruled on this issue.

(1) *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003). The court drew a distinction between a strike motivated by religious beliefs and one motivated by religious affiliation. The court found strikes motivated by religious beliefs (i.e. heightened religious activity) were permitted; no occasion to rule on issue of religious affiliation. The Seventh Circuit makes the same distinction in dicta. *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998), but did not resolve the issue because the court found no plain error.

(2) *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003). *Batson* applies to challenges based on religious affiliation. "Thus, if a prosecutor, when challenged, said that he had stricken a juror because she was Muslim, or Catholic, or evangelical, upholding such a strike would be error. Moreover, such an error would be plain."

(3) *United States v. Williams*, 44 M.J. 482 (1996). The TC peremptorily challenged a member who was the senior African-American officer after he indicated that he was a member of the Masons. The accused was also a Mason. No abuse of discretion for the MJ to grant the peremptory challenge where the TC indicated the race neutral reason was that the member and accused were members of the same fraternal organization. While recognizing that *Batson* does not extend to religion, the court noted that the record in this case was "devoid of any indication of [the member's] religion." CAAF cites *Casarez v. Texas*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (on rehearing), and *State v.*

Davis, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S.Ct. 2120 (1994) as authority that *Batson* does not apply to religion.

(4) *See also U.S. v. Sommerstein,* 959 F.Supp. 592 (E.D.N.Y 1997). In trial of defendant-operators of a kosher catering service on trial for defrauding employees of benefits, prosecutors use of peremptory challenges to remove jurors who were ostensible members of, or had some relationship with the Jewish faith violated *Batson*. The issue of religion was sufficiently intertwined with the criminal charges as to make religion a basis for *Batson* inquiry.

6. Procedural Issues.

a) Order of challenges.

(1) *United States v. Gray*, 51 M.J. 1 (1999): The accused attacked military practice because it unnecessarily permits the Government a peremptory challenge even when it has not been denied a challenge for cause, contrary to *Ford v. Georgia*, 498 U.S. 411 (1991), which states: "The apparent reason for the one peremptory challenge procedure is to remove any lingering doubt about a panel member's fairness . . . ." In the military, accused asserted that "the [unrestricted] peremptory challenge becomes a device subject to abuse." The CAAF noted that Article 41(b) provides accused and the trial counsel one peremptory challenge. Neither Ford, nor any other case invalidates this judgment of Congress and the President.

b) Timing. Defense should object to peremptory challenge before excused member departs the courtroom.

c) Privacy. Judge should use appropriate trial procedures to best protect privacy interest of challenged member.

d) Type of proceedings to substantiate reasons.

(1) Argument by defense is typically enough to complete the record.

(2) Affidavit, adversary hearing, and argument allowed, but evidentiary hearing denied. *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S.Ct. 566 (1988). *See also Ruiz* (above).

e) Findings on Record.

(1) Judge should enter formal findings concerning sufficiency of proffered reasons. MJ should make findings of fact when underlying factual predicate for a peremptory challenge is in dispute. *See Tulloch*, above and *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

(2) MJ not required to raise the issue *sua sponte*, question member, or recall member for individual voir dire.

f) Avoid the Issue. Government should use peremptory challenge sparingly and only when a challenge for cause has not been granted, then *Batson* will most likely be satisfied. *Santiago-Davila* (above).

g) Waiver. *United States v. Galarza*, Army 9800075 (Army Ct. Crim. App. May 31, 2000) (unpub.) (where defense made *Batson* objection to TC's peremptory challenge of a female panel member, and TC stated member showed "indecisiveness" during voir dire, DC's failure to object or to dispute TC's proffered gender-neutral explanation for the peremptory challenge waived issue on appeal). *See also United States v. Gray*, 51 M.J. 1, 35 (1999); *United States v. Brocks*, 55 M.J. 614, 618-19 (A.F. Ct. Crim. App. 2001); *United States v. Walker*, 50 M.J. 749, 750 (N-M Ct. Crim. App. 1999).

h) Three tiers of challenges:

(1) Peremptory challenge: any reason or no reason. Trial counsel's basis must be plausible, reasonable, and make sense. *See Tulloch*, above. While "no reason" might be proper, TC and DC must be prepared to state a race/gender neutral basis or that race/gender was not a motivation for the peremptory challenge.

(2) *Batson* challenge: reasonable racial and/or gender neutral explanation. This applies to TC and DC.

(3) Causal challenge: disqualifying bias (knowledge, experience, victim, free-from-doubt).

VIII. CONCLUSION.

IX. APPENDIX - COURT-MARTIAL PERSONNEL SUMMARY

A. MAJOR POINT	*SUMMARY*
THE CONVENING AUTHORITY	• A convening authority who is an accuser (e.g., by virtue of swearing the charges or having an other than official interest in a case) is disqualified from referring a case to a SPCM or a GCM. UCMJ Art. 1(9), Arts. 22 and 23. A CA who is *statutorily* disqualified can appoint the Article 32 officer and make a recommendation on disposition of the case but must state his or her disqualification. A CA who is *personally* disqualified may not appoint an Article 32 nor may she forward the case with a recommendation for GCM. • There is no presumption of impropriety that arises based solely on the preponderance of senior ranks or commanders on a panel. • A convening authority (CA) must personally select members and refer cases to courts-martial. UCMJ Art. 25(d).
COURT MEMBERS	• A CA may violate the law if she uses criteria other than the UCMJ art. 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members (particularly if the criteria unilaterally excludes a group of otherwise qualified individuals), or to achieve a particular result. Rank is not a selection criterion. Gender and race may be criteria where a CA, in good faith, seeks to include members of these categories for fairness or cross sectional representation. "Court stacking" is impermissible! • No per se exclusion for MPs, rater-ratees. • The presence of an interloper (that is, someone not detailed to the panel) may not be ratified after trial. However, errors in convening order triggering mechanisms (for example, automatic mechanisms to seat at least one-third enlisted members when the accused so requests) are administrative matters, so long as all members who sit are personally selected by the convening authority.
TRIAL *IN ABSENTIA*→	• Trial *in absentia* is only permissible after an effective arraignment. The MJ must ensure that the accused is called upon to enter pleas. Arraignment does not include *entry* of the plea.
THE MJ'S AUTHORITY TO CONTROL VOIR DIRE	• RCM 912 grants a MJ broad authority to control the conduct of voir dire. A MJ may deny a request for individual voir dire, may limit the amount of counsel who participate in voir dire, and restrict the type of questions asked. A MJ, however, should be cautious in placing extreme limits on counsel. While the MJ may foreclose or limit counsel during voir dire, the appellate courts will review whether the MJ abused his/her discretion.
CAUSAL CHALLENGES: STANDARDS FOR EVALUATION	• MJs are to liberally grant challenges for cause (*Moyar* mandate). This ensures fairness of the process and implements RCM 912 (f)(1)(N), which provides that a member should not sit if it would cast substantial doubt as to the legality or fairness of the proceeding. A MJ should not be concerned about the gov't being forced to obtain additional members. • A causal challenge based on actual bias is one of credibility and is reviewed for an abuse of discretion. MJs have significant latitude in making this subjective determination because of the opportunity to observe the demeanor of the court member. Great deference is given to MJ determination. • The bases for causal challenges include inelastic attitude on sentencing, an unfavorable inclination toward a particular offense, being a victim of a offense similar to the one being prosecuted, rating chain challenges, knowledge of the case, and/or expertise in the issues to be litigated. A member is disqualified only after a showing that the basis for a challenge will prohibit the performance of duties as a member.

THE IMPLIED BIAS DOCTRINE	RCM 912(f)(1)(N) also embodies the implied bias doctrine. A MJ must determine whether a member should be disqualified for implied bias based on an objective standard. The question to ask is "would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings?" Implied bias occurs when the member's position, experience, or situation indicates that he/she should not sit, even though the member disavows any adverse impact on their ability to perform member duties.
***BATSON* AND PEREMPTORY CHALLENGES**	*Batson v. Kentucky* prohibits the use of unlawful discrimination in the exercise of a peremptory challenge. Military case law applies *Batson* to courts-martial. A MJ, upon receiving a *Batson* objection, must ask the party making the peremptory challenge to provide a supporting race and/or gender neutral reason, and then determine whether that reason is in fact race and/or gender neutral. A *trial counsel* may not base a peremptory challenge on a reason that is implausible, unreasonable, or otherwise makes no sense. *Tulloch.* *Batson* is applicable to the defense. *See Witham*. The MJ does not have a *sua sponte* duty to raise a *Batson* challenge. In addition, an MJ is not required to conduct individual voir dire in a peremptory challenge situation. *Batson* does not currently prohibit peremptory challenges based on religion. *See Williams. But see DeJesus and Brown*. Civilian cases support that *Batson* does not prohibit peremptory challenges based on age. There is no military case on age.